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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 218

GEORGE H. HAYES, JR., PETITIONER,
VS.
C. C. MOORE CONSTRUCTION COMPANY, INC.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS.

May It Please the Court:

The petition of George H. Hayes, Jr., respectfully shows to the court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

First. *History of the Case*: This suit was filed by petitioner, a citizen of Mississippi, as plaintiff below, against the respondent, a citizen of Florida, as defendant below, in the District Court of the United States for the Hattiesburg Division of the Southern District of Mis-

sissippi. Based upon the verdict of a jury, judgment was entered by the district court in petitioner's favor, from which an appeal was prosecuted by respondent as appellant to the Circuit Court of Appeals for the Fifth Circuit, which court reversed the judgment of the district court and entered judgment in favor of respondent, dismissing petitioner's cause, and petitioner now seeks a review of the decision of the circuit court of appeals.

Second. *Statement of the Pleadings:* 1. *The Complaint.* (a) Petitioner's complaint alleged that respondent, pursuant to a contract with the Mississippi State Highway Commission, was engaged in the construction of a new highway extending from Hawkins Avenue in the city of Columbia, Marion County, Mississippi, in a northerly direction to the Marion County line, a distance of approximately ten miles; that respondent was in full possession and control of said highway and the right of way thereof between the points named; that this new highway intersected Hawkins Avenue about 250 yards east of the old highway and followed an entirely new route and new right of way for a distance of approximately six miles north of said city, at which point the old and new highways converged (R. 2) and that they then followed the same right of way for some distance, the old highway being entirely replaced by the new highway, and that persons traveling south, upon either the old or new highway, would be compelled to get upon and travel the new highway for some distance at this point six miles north of Columbia, and that at the point where the old and new highways intersected the respondent, during the course of construction of the new highway, had maintained a barricade so as to divert southbound traffic onto the old highway for the remaining distance of six miles into Columbia; that this barricade had been so maintained for several months prior to the time of the wrongs complained of, but that respondent removed the same shortly before the injuries in question and opened the

new highway to the public for this distance of six miles to the end of the highway at Hawkins Avenue in Columbia, and invited the public to use and travel the same over this six-mile link of the new highway; that the grading of said new highway had been finished, the same had been surfaced with gravel, and was being constantly used by the public with the full knowledge of and at the invitation of respondent, but that said new highway was still in the full possession and control of respondent and it was engaged in dressing up and putting the finishing touches to said highway (R. 3) in accordance with its contract, preparatory to final acceptance of said highway by the State Highway Commission, which completion and acceptance took place after the occurrence of the injuries complained of.

(b) That the new highway ended at said Hawkins Avenue which was the only public street in Columbia intersected by it and persons traveling south on the highway en route to Columbia were compelled to enter Hawkins Avenue; that at this point the new highway ran almost due north and south and Hawkins Avenue ran in an easterly and westerly direction and that at the intersection "there was an exceedingly sharp curve upon an angle of approximately 110 to 120 degrees, and was so sloped that it was exceedingly dangerous for automobiles to undertake to turn said curve at said intersection while traveling at a rapid rate of speed, and the said curve was constructed by the defendant, and was in the exclusive possession and control of the defendant at the time of the wrongs and injuries herein complained of, and the defendant then and there knew of the hazard incident to automobiles traveling said new highway and undertaking to negotiate said curve and entering said Hawkins Avenue at said point" (R. 4).

(c) That under respondent's contract with the highway commission for construction of said highway and also under the law of Mississippi, it was respondent's

duty to construct and maintain barricades and danger and warning signals at all dangerous points along said new highway, including the said point of intersection of the new highway with Hawkins Avenue (R. 5).

(d) That respondent negligently failed to discharge its said duty in that shortly before the accident complained of the respondent removed all barricades and all danger and warning signals from said new highway and opened the entire link of said new highway to traffic and travel by the general public, and invited the public, including petitioner, to use the new highway, and negligently failed to erect any barricade or warning sign or danger signal at or near said sharp curve where the new highway abruptly ended at its intersection with Hawkins Avenue, and consequently there was great danger that persons traveling the new highway and unfamiliar therewith, particularly in the nighttime, might approach said abrupt end of the new highway at a rapid speed and be thereby entrapped at said curve and be unable to negotiate the same with reasonable safety, and that respondent knew the same or should have known thereof by the exercise of reasonable care, but negligently maintained said sharp and abrupt curve at said point without any kind of barricade or warning sign or danger signal (R. 5).

(e) That on September 10, 1939, petitioner was operating an automobile, in the nighttime, in a southerly direction en route from Prentiss, Mississippi, to Columbia, Mississippi, and he was ignorant of said dangerous and unsafe curve and could not see the same by the headlights of his automobile until he reached the intersection, when it was then too late to check his speed sufficiently to negotiate the curve with reasonable safety, and that said automobile was caused to enter said curve at a rapid rate of speed and to be thereby overturned and wrecked, as a result of which petitioner received most serious permanent injuries (R. 6).

(f) That the proximate cause thereof was respondent's negligence in failing to exercise reasonable care to provide a barricade, or warning sign, or some signal of danger at or near said point so as to warn travelers of said dangerous curve and of the abrupt ending of the highway thereat (R. 7).

2. *The Answer*: Respondent's answer admitted the general situation described in the complaint, admitted that the job had not been accepted by the highway commission at the time of the wreck, admitted that the highway was still in respondent's possession and control at the time, but, as a first defense, denied the negligence charged, and, as a second defense, averred that petitioner's own negligence brought about and contributed to his injuries in that he was driving at a reckless and unlawful rate of speed without keeping a proper lookout and without exercising due care for his own safety (R. 8-10).

Third. *Summary of the Evidence*: Respondent's contract with the Mississippi State Highway Commission was offered in evidence (R. 176-200). By agreement of counsel (R. 370-371) only certain pertinent portions are printed in the record. Under this contract barricades and signs were to be provided by respondent and the cost thereof was included in its bid (R. 178-179). Even when the road was closed to traffic the contractor was obligated for the "construction and maintenance of barricades, danger and warning signs" and the cost thereof was included in its contract price (R. 179). The contract provided, among other things, as follows:

> "The contractor shall provide, erect, and maintain all necessary barricades, sufficient red lights, approved danger signals and signs, provide a sufficient number of watchmen, and take all necessary precaution for the protection of the work and safety of the public" (R. 197-198).
>
> "Until the final acceptance of the work by the Engineer (for the Highway Commission) as evidenced in writing, the contractor shall have the charge and care thereof" (R. 198).
>
> "No highway shall be closed to public travel except upon order of the Director (of the Highway Commission). * * * The contractor will, however, in

accordance with this section, safeguard the convenience and safety of the traveling public or others, whether: the section of the highway subject to his operations has ever been open to public travel; or, is closed by order of the Director; or, open to the public for travel during his operations. Any of these premises will not relieve the contractor of this responsibility. The Director reserves the right to open or close any section of the project to public travel at any time; this shall not be construed as acceptance by the Director of such sections. The contractor shall take such steps as are necessary to safeguard his work and operations, and the public. * * * Whenever, in the opinion of the Engineer, any roadway or any portion thereof or any structure is in acceptable condition for travel, it may be opened to traffic. Upon written order of the Engineer, the contractor may cease to maintain barriers and warning lights, the roadway may be opened to travel and the contractor relieved of further responsibility for the maintenance of barriers and warning lights on that portion of the highway. The contractor will be held responsible for any damages occurring by reason of traffic or otherwise as a result of defective work or material or other non-compliance with the contract" (R. 198-199).

The wreck in question occurred on September 10, 1939 (R. 15). The respondent continued its work on the road pursuant to its contract every day thereafter to and including September 30, when the work was completed and the contract accepted by the highway commission (R. 354-366).

The south six miles of this new highway was built upon an entirely new right of way, through an unsettled and wooded country, where there was not even a house in sight for the last two miles before it reached Hawkins Avenue (R. 20, 38, 80, 98, 112, 139-140). Hawkins Avenue was just inside the city limits, the corporation line being 350 feet to the north up the new highway (R. 208). None of the city was built up north of Hawkins Avenue along the new highway and no part of the new highway went

through any built-up portion of the city (R. 18, 38, 80, 85, 98). There was no sign at the city limits and nothing to let travelers know they were getting into Columbia (R. 18, 41-42, 52, 74-76, 78, 85, 88, 98, 107, 132, 140, 312). The new highway was surfaced with gravel and entered Hawkins Avenue, which was surfaced with black-top paving, at an angle of about 110 degrees (R. 18, 38, 85). Gravel from the new highway had been dragged by the road machine or knocked by traffic across the paving of Hawkins Avenue at the intersection, so as to obscure the intersection (R. 21, 40). On beyond the intersection was an open block of weeds and grass, covered with dust, which, combined with the gravel across the paved portion of the intersection, gave the appearance that the highway continued on straight ahead (R. 21, 40, 81, 117, 138, 161).

Respondent had maintained a barricade six miles north of the Hawkins Avenue intersection, at the point where the old and new roads converged, so as to divert southbound traffic off the new highway and onto the old road, but late in the afternoon on the day before the wreck in question, respondent removed this barricade and opened the new highway to the public for the last six miles into Columbia, and for the next 26 or 28 hours, up until this wreck, the new highway was open to traffic and in constant use by the public (R. 105, 113-114, 121). Respondent's superintendent admitted that he saw that this barricade was removed and lying down by the side of the road (R. 262) and admitted that he did not order it to be put back to keep traffic off the new highway, and admitted that he purposely left the new highway open to the public, and that the traveled part was wide open and the public was welcome to use it (R. 271-272). This barricade was removed by one of the respondent's employees engaged in machining or blading the road (R. 121, 283).

On the day before the wreck, respondent had also removed all barricades and warning signs from the south

end of the highway at its intersection with Hawkins Avenue (R. 98-99, 126-127, 135, 273, 276). Fourteen witnesses for petitioner and seven for respondent testified that there was no sort of warning sign, danger signal, light, or anything else to warn travelers of the danger at the abrupt end of the highway on the occasion in question (R. 20, 37, 74-76, 83-84, 87-88, 92, 98, 127, 139, 149, 156, 160, 164, 170-171, 233, 254-255, 273, 339, 375, 405). Respondent's superintendent admitted that on this occasion the warning sign at the Hawkins Avenue intersection was down with his knowledge and the road was opened to the public without a warning of any character at or near this place (R. 276).

This link of the new highway having thus been opened to the public on September 9, 1939, with no kind of barricade to direct travelers not to use it, and with no sort of warning signal, sign or light to advise travelers of the abrupt end of the new highway at Hawkins Avenue, the petitioner with two other people, driving in an automobile, accepted respondent's invitation to use the highway and proceeded to travel it, in the nighttime on September 10, 1939. Neither petitioner nor either of his passengers had ever been on this new highway before (R. 16, 38-39). The roadway and all parts of the automobile were in good condition (R. 18, 19, 36, 37). All were on the front seat of the car and all were watching the road ahead (R. 19, 20, 37). They were traveling at a speed of 40 to 45 miles per hour (R. 20, 39). Because of the gravel being over the paved part of the intersection, and because of the open block of dead grass and weeds beyond the intersection, covered with dust, the road appeared to continue straight ahead and they could not see the intersection and could not see the sharp turn at the intersection until they were immediately upon it (R. 20, 39, 40) and about the time the car reached the intersection petitioner applied the brakes and tried to turn to the right, but was unable to make the turn and the automobile

went into and across a drainage ditch just below the intersection and turned over (R. 21).

Numerous persons testified that it was impossible to see this intersection at night until a traveler was upon or almost upon it (R. 20, 39, 78-79, 95, 107, 117, 132, 144-145, 151, 161, 171). A number of witnesses related facts showing that the turn at the end of the highway was extremely dangerous (R. 20, 21, 39, 40, 78, 81-82, 98, 107, 116-117, 132, 144-145, 151, 152, 157, 161, 175). During the brief space of 26 or 28 hours that the road was left open without any warning signal at this dangerous intersection a number of automobiles had difficulty and some almost wrecked at this intersection. On the night of the wreck G. W. Williamson approached this turn at a speed of 25 or 30 miles per hour and had to put on his brakes in order to make the turn (R. 82). Mrs. Zeno Robertson testified that "it was a bad turn for anybody that didn't know it" (R. 107). Mr. Zeno Robertson testified that a traveler approaching the intersection, in order to see it before he reached it, "would have to be watching mighty close and knowing everything" (R. 117). Just before the wreck, on the same night, Mrs. W. D. Corley testified that she traveled this new highway with her husband driving and they approached this intersection, and, although they had been over it many times before and were familiar with it, they were unable to see it and almost had a wreck in negotiating the turn at a speed of 25 miles per hour (R. 132). Mr. W. D. Corley, an employee of the State Highway Department, testified to the same effect, and said that he was unable to see the intersection until he was almost upon it, and "it slipped up on me" (R. 144-145). Mr. Sebe Dale, district attorney for the Fifteenth Judicial District of Mississippi (R. 148), traveled the new highway and reached the intersection just after the wreck; he testified, "I was on that place before I knew it. I had never traveled that road at night; I had come off Hawkins Street on to the new highway just lots of times, but I had never come in on it at night. * * * I got pretty

close to it before I discovered it. I was running pretty fast right on up to there. I knew I was getting in to town but I didn't know how sharp that curve was. I hadn't traveled that road at night. I ran up on it rather suddenly, and it somewhat scared me. * * * I had a good car with hydraulic brakes. I slowed down and made my curve" (R. 151-152). This witness also said, on cross examination, that since the wreck counsel for respondent had requested him to observe the curve and experiment to determine at what speed he could make it, and, as to this, he said, "A man could turn it at twenty-five, but if he gets up to thirty or thirty-five his wheels will slip" (R. 152). Mrs. Robert Parker testified that she came over the new highway after the wreck on the same night and "when we came to that place there was no sign or warning that it was an intersection, and we almost had an accident" (R. 157); "it was a mighty sharp turn but I don't know the angle" (R. 158). Mrs. G. H. Hayes, Sr., came over the new road in the car with Mr. G. W. Williamson on the night of the wreck and on cross examination she was asked how far she could see the intersection before reaching it, and she said, "I didn't see it until Mr. Williamson made the turn, and I didn't realize that the turn was there; it frightened me when we made the turn because I thought we were going straight ahead" (R. 175).

There is no dispute of the fact that prior to his injury petitioner had a perfect physique, participated in school athletics, played football in high school and college, was on the boxing team and track team, a fast runner, a fine athlete, a giant in strength and in absolutely perfect physical condition (R. 22, 23, 54, 55, 68, 165, 172). There is likewise no dispute of the fact that in the wreck he sustained a severe brain injury, as well as numerous other personal injuries, all of which are permanent, and that as a result thereof his bodily strength has been impaired and his mental condition seriously affected (R. 60-73, 165-166, 172-173).

Summarizing briefly, the testimony showed that all barricades and warning signs were removed from this road about 26 or 28 hours before the wreck in question, and the road was opened by respondent to unrestricted public traffic, being at the time in first-class condition and almost completed, though still under respondent's full control, possession and responsibility and not taken over by the State Highway Commission. Danger signs had been maintained at the end of the highway until that time, but these were removed a little over a full day before the accident. There was no written order from any representative of the highway department to move these signs (R. 274) and the removal was therefore in positive violation of respondent's contract with the State Highway Commission, which provides that the warnings may be removed only "upon written order of the engineer" (R. 199). On the following night there was no kind of warning at the end of the highway; in fact no witness claims that there was any warning sign or signal or light at this point, and respondent's superintendent admits that there was none (R. 273). That it was a dangerous place is evidenced by the fact that on the very night in question not only did petitioner's wreck occur, but there were several others who had difficulty at the same place (R. 132, 144-145, 151, 157, 175). Many witnesses testified to facts showing that it was a bad turn at the end of the highway and a dangerous place to approach at night because of the fact that the road machine or passing cars had dragged or knocked gravel over the paved portion of the intersection, and on straight ahead beyond the intersection there was an open space, on the same level, grown up with grass which was covered with dust and which gave the appearance of being a continuation of the main highway, when instead of a continuation, there lay immediately beyond the intersection a drainage ditch, below the level of the ground, which constituted a pitfall and caused petitioner's wreck.

Fourth. *Proceedings at the Trial*: Upon conclusion of petitioner's evidence, respondent moved for a directed verdict (R. 200), but the district judge felt that there were sufficient facts proven to make an issue for the jury on the question whether the abrupt ending of the highway was sufficiently dangerous to require respondent to have given some reasonable warning of the situation, and accordingly overruled the motion "at this time" (R. 201). At the conclusion of all the evidence respondent renewed its motion for a directed verdict and the trial judge again overruled the same (R. 412-413 and 442-444) and submitted the cause to the jury for decision under a full, fair, and complete charge, entirely in accord with the law of Mississippi, upon the issue as to whether the situation was such that in the exercise of reasonable care respondent owed the duty of giving some kind of warning to travelers and whether it was liable for a breach of that duty (R. 413-426). The jury returned a verdict in favor of petitioner upon the issues submitted, and judgment in petitioner's favor was entered accordingly (R. 444-445).

Fifth. *Proceedings in District Court After Judgment*: (1) Within ten days after the verdict, respondent filed a motion for a new trial "or corrected judgment" (R. 445-447) which was overruled (R. 447-448). It is important to note that this motion for a new trial did not renew respondent's motions for a directed verdict, made before the verdict of the jury, as contemplated and required by Rule 50 (b) of the Rules of Civil Procedure for the District Courts of the United States. The motion asked for a new trial "or corrected judgment" but did not ask for a judgment notwithstanding the verdict or for a judgment to be entered in respondent's favor in accordance with its prior motions for a directed verdict (R. 445-446). Furthermore, the order overruling respondent's motion describes the motion as being "for a new trial or corrected judgment" and in the adjudicating part says "It is thereupon the judgment of the court that the *motion for a new trial* filed

by and for the defendant herein be and it is hereby overruled, and to which action of the court the defendant in open court excepted and which exception was granted" (R. 447-448). Neither the overruling order nor the respondent's exception thereto makes any reference whatsoever to any motion or request for a judgment to be entered in respondent's favor in accordance with its prior motions for a directed verdict, as required by said Rule 50 (b). Rspondent made no request for any further or additional order or ruling on its motion.

(2) Respondent subsequently gave notice of appeal to the circuit court of appeals (R. 448) complaining only therein of the trial court's action in overruling its motion for a new trial and making no claim whatever that a judgment *non obstante veredicto* should have been entered.

Sixth. *Proceedings in Circuit Court of Appeals*: The circuit court of appeals (1) held that as a matter of law the turn into Hawkins Avenue at the end of the new highway was not dangerous, that therefore respondent was under no duty to give any warning of the turn, and that consequently respondent "was in no way guilty of negligence which caused or contributed to the accident" (R. 463) and (2) held that "the defendant's motion for an instructed verdict should have been granted" (R. 463) and accordingly entered a judgment reversing the judgment of the district court and dismissing petitioner's suit (R. 463), thereby disregarding respondent's failure to comply with the requirements of Rule 50 (b) in asking for a judgment notwithstanding the verdict, and holding, in effect, that a compliance with this rule by respondent was not necessary in order to justify entry of judgment in respondent's favor in dismissing the complaint. As to these two points, petitioner shows:

(1) *As to Whether Respondent Should Have Given Warning to Travelers*: Petitioner was entitled under the law to the benefit of the most favorable inferences de-

ducible in his favor from the substantial evidence offered at the trial. There was abundant substantial evidence from which an inference might be drawn that the turn at the end of the new highway was dangerous. The drawing of such an inference is peculiarly within the province of a jury. If the jury should determine from the evidence that the situation was dangerous, then it was the duty of the jury to determine whether respondent, in the exercise of reasonable care, should have given warning to travelers of this dangerous situation when it opened the highway to traffic and invited the public to use it, and it was also the province of the jury to determine whether respondent was guilty of negligence in failing to give any warning, as it admitted it failed. The circuit court of appeals recited one version of the facts and accepted them as established and undisputed from the evidence, disregarding other evidence in the record which tended to establish directly the opposite, particularly with reference to the dangerous situation at the end of the highway. The facts which the court found could have been found by the jury, or the opposite could have been found by the jury, as was in fact done in this case. It certainly cannot be said, however, that the facts which the court found and the inferences which the court drew were those most favorable to petitioner which could be found or deduced from the evidence in this case, and it has long been the settled law that the verdict of a jury is not to be peremptorily directed or upset upon appeal unless the latter is true. Therefore the holding of the circuit court of appeals was a direct invasion of the province of the jury in that it understates and ignores some of the facts upon which petitioner relied, and as between conflicting testimony it chooses a version entirely different from that which it may be fairly assumed the jury believed as, for instance, the court said, "The curve was not in itself dangerous and could be and was safely negotiated by drivers of other automobiles traveling along the road that very night" (R. 463), ignoring entirely the fact that numerous witnesses testified to facts from which it might

be inferred that the turn was dangerous (R. 20, 21, 39, 40, 78, 81, 82, 98, 107, 116, 117, 132, 144, 145, 151, 157, 161, 175), ignoring the fact that eevry automobile at or around the time of the wreck, which was shortly after dark, had difficulty in making the turn and almost wrecked at the same spot (R. 82, 132, 144, 145, 151, 152, 157, 175), and ignoring the further fact which petitioner sought to show at the trial, and would have shown but for the objection of respondent, that shortly after the wreck respondent's witness, Robert Newsom, obtained and placed a lighted flare in the highway at the approach to its end (R. 255) and that the other automobiles which safely made the turn that night after the wreck had the benefit of this flare as a warning (R. 84, 88, 156). Again, the circuit court of appeals invaded the province of the jury in holding that respondent "was in no way guilty of negligence which caused or contributed to the accident" (R. 463), thereby depriving the jury of the right under the law to determine from the facts proven what does and does not constitute negligence and whether reasonable care has been exercised, for it has long been the settled law that questions of reasonable care and negligence are questions for determination by a jury and not by the court where there are facts in evidence from which reasonable men might infer that reasonable care has not been exercised and that negligence has been established. Furthermore, the circuit court of appeals invaded the province of the jury in holding that "the failure of the appellee (petitioner) to have his car under proper control as he approached and entered the curve was the sole proximate cause of the accident" (R. 463) for it has long been the settled law that if in an accident both parties are guilty of negligence, then the question of whose negligence was the proximate cause of the resulting injury is a question of fact for decision by a jury.

It is submitted by petitioner that these holdings of the circuit court of appeals violated the Seventh Amendment to the Federal Constitution in that they denied petitioner the right of a trial by jury.

(2) *Respondent's Failure to Comply With Requirements of Rule* 50 (b): In its motion for a new trial respondent merely moved "to set aside the verdict of the jury and the judgment entered thereon in the sum of $15,750.00 and to grant to the defendant a new trial or corrected judgment" (R. 445). In the order overruling the motion it is adjudicated merely "that the motion for a new trial filed by and for the defendant herein be and it is hereby overruled" (R. 447-448). Neither in the motion nor in the order entered thereon is there any request or reference to a request by respondent "to have the verdict and any judgment entered thereon set aside *and to have judgment entered in accordance with his motion for a directed verdict,*" as required by Rule 50 (b) of the Rules of Civil Procedure, nor is any such request or suggestion made in respondent's notice of appeal (R. 448). There is no indication in the proceedings looking to an appeal that respondent was seeking in the circuit court of appeals anything other than a conventional reversal and remand for a new trial on the merits, but notwithstanding this, and notwithstanding respondent's failure to comply with Rule 50 (b), the circuit court of appeals gave respondent the benefit of Rule 50 (b) and reversed the judgment of the district court and summarily dismissed petitioner's complaint (R. 463). The effect of this action is that petitioner has been denied his right to have respondent comply with Rule 50 (b) by requesting a judgment *non obstante veredicto* as a condition precedent to dismissal of his complaint after verdict and judgment.

B.

BASIS OF THE COURT'S JURISDICTION.

It is competent for this court to require by certiorari that this cause be certified to it for determination pursuant to the Act of February 13, 1925, Chapter 229, Sec-

tion 1, 43 Stat. 938, amending and re-enacting Section 240 (a) of the Judicial Code, 28 United States Code Annotated, Section 347.

C.

QUESTIONS PRESENTED.

Two separate and wholly independent questions are presented:

(1) Whether the circuit court of appeals violated the general common law relating to trials by jury and denied trial by jury to petitioner in violation of the Seventh Amendment to the Federal Constitution in peremptorily determining that there was no evidence upon which the jury might find that the place where petitioner was injured at the end of the highway was dangerous, in peremptorily determining that respondent was under no duty to give warning to travelers approaching the end of the highway, in peremptorily determining the question whether respondent was guilty of negligence in failing to give warning to travelers on the highway, and in peremptorily determining that the sole proximate cause of the accident was the negligence of petitioner in not having his car under proper control as he approached the end of the highway, thus usurping the functions of the jury by invading their exclusive province with respect to determining whether the turn at the end of the highway was dangerous, whether reasonable care required warning of such danger by respondent, and whether the admitted failure to give such warning was a proximate contributing cause of petitioner's injury.

(2) Whether Rule 50 (b) of the new Rules of Civil Procedure, which expressly provides that, "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the

jury subject to a later determination of the legal questions raised by the motion", and which further provides that, "Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict," is to be construed as though it provided that if the party does not within ten days or at any other time after return of the verdict move to set aside the verdict and judgment and to have contrary judgment entered in accordance with his original motion made before verdict, such a motion shall, nevertheless, be deemed to have been made and denied. Otherwise expressed, whether a party, after judgment, need not seek a judgment *non obstante veredicto* in the district court, nor the district court consider the entry of one, in order to authorize the circuit court of appeals to hold that such judgment *non obstante veredicto* should have been entered in the district court and to peremptorily enter such judgment itself, thus attributing to the district court error in failing to do that which the district court was not asked to do.

D.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) Because it is important, in order that the right of trial by jury may be preserved as intended by the Seventh Amendment to the Federal Constitution, that this court shall determine whether a circuit court of appeals may determine that a verdict should have been directed by finding facts less favorable to petitioner than those which might have been found by the jury on the evidence, and determining that the facts so found by the court do not constitute negligence, and further determining whose negligence was the sole proximate cause of an accident

when there was evidence that both parties may have been guilty of negligence in a jurisdiction where contributory negligence of the plaintiff does not bar a recovery but only goes to a diminution of damages.

(2) Because the decision to be reviewed determined a novel and important question arising under Rule 50 (b) of the New Rules of Civil Procedure for District Courts in a way probably in conflict with the decision of this court in *Aetna Insurance Company* v. *Kennedy*, 301 U. S. 389, 394-395, 81 L. Ed. 1177, 1181, which dealt with the state practice after which this rule was modeled, and *Montgomery Ward & Co.* v. *Duncan*, No. 30, October, 1940, Term, 85 L. Ed., Adv. Ops. No. 3, pages 132, 136, 137, 138, 311 U. S. Adv. Ops. No. 2, page 243, which dealt directly with Rule 50 (b), and *Conway* v. *O'Brien*, No. 344, October, 1940, Term, 85 L. Ed., Adv. Ops. No. 9, pages 574 and 575, not yet officially reported, and *Berry* v. *United States*, No. 336, October, 1940, Term, 85 L. Ed., Adv. Ops. No. 9, pages 576, 577, 578, not yet officially reported in which last two cases this court granted certiorari because of failure of the circuit court of appeals to properly apply Rule 50 (b) and in which this court indicated its thought as to Rule 50 (b) but which cases were decided on other grounds after certiorari was granted for a consideration of the efefct and application of Rule 50 (b).

E.

PRAYER FOR WRIT.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this court for its review and determination a full and complete transcript of the record and all proceedings in the case numbered

and entitled on its docket, "No. 9833, *C. C. Moore Construction Company, Inc., Appellant*, v. *George H. Hayes, Jr., Appellee*," and that the judgment of said circuit court in said cause may be reviewed and determined by this Honorable Court.

George H. Hayes, Jr.,
Petitioner,

By Toxey Hall and
Lee D. Hall,
Columbia, Mississippi,

Counsel for Petitioner.

E. B. Patterson,
Monticello, Mississippi,

Bernard Callender,
Columbia, Mississippi,

Of Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

GEORGE H. HAYES, JR., PETITIONER,

VS.

C. C. MOORE CONSTRUCTION COMPANY, INC., RESPONDENT.

BRIEF IN SUPPORT OF PETITION.

I.

THE OPINION OF THE COURT BELOW.

This case in the district court was not reported. The opinion of the circuit court of appeals will be found in the record at pages 459-463, but has not yet been officially reported in the Federal Reports.

II.

GROUNDS OF JURISDICTION.

This court has jurisdiction pursuant to the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, amending and re-enacting Section 240 (a) of the Judicial Code, 28 United States Code Annotated, Section 347.

III.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in the "Summary Statement of the Matter Involved" in the accompanying petition for certiorari, and in the interest of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

IV.

SPECIFICATION OF ERRORS.

(1) The court erred in finding error in the action of the district court in submitting the case to the jury on the issue of negligence of respondent in failing to exercise reasonable care to provide reasonable warning of the dangerous situation at the end of the highway by assuming facts less favorable to plaintiff-petitioner than the jury could have found from the evidence.

(2) The court erred by invading the province of the jury in peremptorily determining that respondent was under no duty to warn travelers approaching the end of the highway.

(3) The court erred by invading the province of the jury in peremptorily determining that the sole proximate cause of the accident was the negligence of petitioner in not having his car under proper control as he approached the end of the highway.

(4) Having found error in the submission of the case to the jury, the court erred in entering judgment final for defendant-respondent instead of ordering a new trial.

V.

SUMMARY OF THE ARGUMENT.

POINT A.

The Circuit Court of Appeals Erred in Finding Error in the Action of the District Court in Submitting the Case to the Jury on the Issue of Negligence of Respondent.

Petitioner was entitled to the most favorable inferences deducible from the evidence. There being evidence showing that the turn at the end of the highway was dangerous, there was clearly a jury issue on the question whether reasonable care required warning of this danger, and the circuit court of appeals erred in assuming facts less favorable to petitioner than the jury could have assumed from the evidence, and erred in holding from the facts thus assumed that respondent owed no duty to warn of the danger thereby usurping the province of the jury and depriving petitioner of his constitutional right to trial by jury, and erred in failing to apply to the facts the law of Mississippi as determined by the Supreme Court of Mississippi and as determined by previous decisions of the circuit court of appeals, and in failing to apply to the facts the principles of the common law as determined by this court.

POINT B.

The Circuit Court of Appeals Erred by Invading the Province of the Jury in Peremptorily Determining That the Sole Proximate Cause of the Accident Was the Negligence of Petitioner in Not Having His Car under Proper Control As He Approached the End of the Highway.

Under the law of Mississippi petitioner was driving at a lawful rate of speed. The circuit court of appeals

failed to apply that law and held that the sole proximate cause of petitioner's injury was his own negligence in driving at an unlawful speed, ignoring the Mississippi statute providing that contributory negligence shall not bar a recovery but shall only serve to diminish the damages recoverable, and ignoring the decisions of the Mississippi Supreme Court holding that violation of traffic laws is only contributory negligence, and further ignoring the decisions of the Mississippi Supreme Court and of this court that the question of what is the proximate cause of an injury is a question for decision by a jury, and thereby the circuit court of appeals invaded the province of the jury and deprived petitioner of his constitutional right to trial by jury.

POINT C.

Assuming That the District Court Erred in Submitting the Case to the Jury, the Circuit Court of Appeals Erred in Directing Judgment Notwithstanding the Verdict Instead of Directing a New Trial.

After verdict and judgment in the district court, respondent did not make a motion for judgment *non obstante veredicto* as required by Rule 50 (b) of the Rules of Civil Procedure. Such motion was a condition precedent to authority for the circuit court of appeals to dismiss petitioner's case, and its action in ordering a final dismissal thereof instead of remanding for a new trial was contrary to Rule 50 (b), contrary to its own prior decisions, and contrary to the decisions of this court interpreting Rule 50 (b).

VI.

ARGUMENT.

POINT A.

The Circuit Court of Appeals Erred in Finding Error in the Action of the District Court in Submitting the Case to the Jury on the Issue of Negligence of Respondent.

Under this point Specifications 1 and 2 will be discussed.

In its opinion in this case the circuit court of appeals correctly stated the issues involved, when it said: "Boiled down, the case turns upon the question of whether the contractor was under a duty to place warning signs or danger signals at or near the curve, and, if so, whether its failure to place such signs or signals caused or contributed to the accident which resulted in injury to appellee" (R. 461).

If there was substantial evidence supporting the petitioner's position that the turn at the end of the highway was dangerous, then the question as to whether respondent owed the duty of warning travelers against the danger was a question of fact for a jury, and the court usurped the province of the jury and deprived petitioner of his constitutional right to a trial by jury when it held in its decision that the curve was not dangerous and that respondent was guilty of no negligence in failing to give warning thereof.

In determining the sufficiency of the evidence to establish negligence "the plaintiff is entitled to the most favorable inferences deducible from the evidence and to the rejection of the unfavorable ones," *Boal* v. *Electric Storage Battery Co.*, 98 F. 2d 815, and, "Everything must

be considered as proved which the evidence in the case established directly or by reasonable inference," *Keith* v. *Yazoo & Mississippi Valley Railroad Co.*, 168 Miss. 519, 151 So. 916, and, "the testimony shows, and, in deciding a question of this character, the view must be taken of it most favorable to the plaintiff * * *," *Kreigh* v. *Westinghouse, C. K. & Co.*, 214 U. S. 249, 253, 53 L. Ed. 984, 987.

Furthermore, in determining the issue of negligence the law of Mississippi controls. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.

In *Myers* v. *Sanders*, 194 So. 300, 189 Miss. 198, the Supreme Court of Mississippi, in discussing the duty of a road contractor with respect to both completed highways and those still under construction, announced this rule:

> "A completed highway should be kept and maintained in a reasonably safe condition for those exercising ordinary care in traveling thereon, but when there are sufficient facts and circumstances to put a motorist on notice that a highway is under construction, the duty of the contractor in regard thereto only requires that it be kept and maintained in a reasonably safe condition for use 'by those exercising vigilant caution and keeping a constant lookout.'"

In the case of *Graves* v. *Johnson*, 176 So. 256, 179 Miss. 465, the injured party, in broad daylight, drove into a large three-ton trailer, twenty feet in length, painted with aluminum, which had been placed across a paved highway by a contractor to prevent travelers from driving upon and ruining freshly laid concrete paving. There was a conflict in the evidence as to whether proper barricades and detour and warning signs were in place upon the highway, and as to whether the driver knew or was chargeable with knowledge that the highway was under construction. Although the case was remanded for a new trial on other grounds, the Supreme Court of Mississippi,

in discussing the question as to whether the contractor was entitled to a directed verdit, said:

> "Under this record, including the photographs introduced by appellees, the issue is undoubtedly close upon the stated point; but the established rule in this state is that, when looking solely to the testimony in behalf of the party against whom the peremptory charge is requested, and taking that testimony as true, there is enough of facts testified to, along with the reasonable inferences which could be drawn therefrom in favor of said party, to support a verdict for him, the peremptory charge is not allowable. *Mobile & Ohio R. R.* v. *Johnson*, 165 Miss. 397, 141 So. 581. Without reviewing the evidence for appellees, which to do would considerably lengthen this opinion, we merely state that, upon a careful consideration of that evidence, we are of the opinion that the court was not in error in refusing the peremptory charge."

In three cases prior to the present one, the Circuit Court of Appeals for the Fifth Circuit correctly stated and applied the Mississippi law and affirmed judgments for plaintiffs who had been injured by reason of the failure of road contractors to properly warn against dangers, but in this case the court refused to apply the law of Mississippi as interpreted by its Supreme Court, and refused to apply the rules previously announced in its own decisions on the Mississippi law, and sought to distinguish its prior decisions from the case at bar. Petitioner refers briefly to those cases, all of which support his position.

In *Owens* v. *Fowler*, 32 F. 2d 238, which originated in Mississippi, a road contractor was engaged by contract in doing the grading work for a highway; his job ended 60 feet from a railroad cut, at which point he had built up a fill 12 feet in height which was to be the approach to a bridge over the railroad to be constructed subsequently by another contractor; the result was that there was a 12-foot drop at the end of the road. The contract contained

the same provisions as in this case to the effect that the contractor would maintain all necessary barricades, danger warnings, and detour signs. As stated by the court, "Appellants (the contractors) had not quite completed their contract, but the road was opened and in use by the public." Two cars ran off the end of the road and went down the 12-foot fill, resulting in three deaths, for which suit was brought, negligence being based upon the failure of the contractor to erect and maintain proper barricades and danger signals. The plaintiffs recovered judgment in the district court, and the circuit court of appeals affirmed it, using this succinct language, which adopts the very principle applicable to the case at bar:

> "The stipulation in the contract as to the taking of measures for the safety of the public using the road was for the benefit of the public. Furthermore, appellants had not completed their work, and, with full knowledge of the danger arising from its abrupt termination at the railroad cut, they permitted the public to use it. The contention is without merit. *Casement* v. *Brown*, 148 U. S. 515, 13 S. Ct. 672, 37 L. Ed. 582.
>
> "On the question of negligence in failing to erect proper barricades, warning and detour signs, the evidence was conflicting, and this was properly left to the jury."

The above case was cited in the court below, and the circuit court of appeals took notice thereof, but refused to apply the rules just quoted, and, instead, undertook to distinguish that case from the one at bar, using only this one sentence in so doing: "In *Owens* v. *Fowler* the road, which was under construction, ended abruptly and without warning at a deep railroad cut, and an automobile ran over the dump at the end of the road and into the cut, and its three occupants were killed" (R. 462). In the case at bar, just as in *Owens* v. *Fowler*, the road was almost completed but was still under construction; in the case at bar, just as in *Owens* v. *Fowler*, the road ended abruptly

and without warning; in the case at bar the road ended at a drainage ditch which was deep enough to wreck a car and ruin a young man for life, while in *Owens* v. *Fowler* the road ended at a railroad cut deep enough to wreck a car and kill three people. In both cases there was a pitfall ahead which caused the wreck. In *Owens* v. *Fowler* the court correctly stated that the question of negligence in failing to erect proper warning and detour signs was properly left to the jury; in the case at bar the court refused to follow this well-recognized principle of law and invaded the province of the jury by holding that the question of negligence was not one for the jury, and thereby deprived petitioner of his constitutional right of trial by jury.

In *W. G. Wetmore & Co.* v. *Reed*, 98 F. 2d 532, which also originated in Mississippi, one Neely had constructed a highway up to a stream and Wetmore was engaged in constructing a bridge to span the stream. Neely had finished his work and had received final approval thereof by the highway commission. He had erected a barricade 1800 feet from Wetmore's construction, but it had been removed on order of the highway engineer so as to permit Wetmore's trucks to pass with material for the bridge work. Wetmore maintained a barricade at the end of the road which Neely built and in proximity to a large pit which Wetmore had excavated in connection with his bridge contract. At night, Wetmore failed to light this barricade as his contract required, and a car ran into the barricade and plunged into the pit resulting in the death of the driver. This occurred six days after Neely's contract had been accepted by the highway commission. In that case Neely was of course held not liable, but on the issue as to whether reasonable care required Wetmore to have a light on his barricade, the circuit court of appeals said:

> "There was evidence tending to show that the barricade was about the same color as the road and anyone approaching it in an automobile could not see

it until close upon it. If so, the failure to indicate its presence by a proper light to anyone approaching it at night could be negligence. * * * We consider there was sufficient evidence to go to the jury on the question of negligence on the part of Wetmore."

The Wetmore case was cited in the court below, and the circuit court of appeals took notice thereof, but refused to apply the law just quoted, and, instead, totally ignored the position of Wetmore and applied to the contractor in the case at bar exactly the same position as that of the contractor Neely (R. 462) whereas in the case at bar the contractor was still engaged at work on his project for a period of twenty days after petitioner's wreck and before acceptance by the highway commission (R. 354-366), while in the Wetmore case Neely had completed his contract and had obtained final acceptance thereof by the highway commission six days before the wreck. Furthermore, in the Wetmore case it was pointed out that the barricade ahead "was about the same color as the road and anyone approaching it in an automobile could not see it until close upon it," just as in the case at bar the dead grass ahead, covered with dust from the road, was about the same color as the road, the black paved portion of the intersection was covered with gravel from the road, and it was impossible for a traveler to see the intersection until close upon it. Yet the circuit court of appeals in the case at bar refused to apply the foregoing law laid down as to Wetmore, totally ignored the position of Wetmore in that case as applicable to the contractor in this case, and invaded the province of the jury in passing upon the question of negligence, and thereby deprived petitioner of his constitutional right of trial by jury.

In *Trinidad Asphalt Manufacturing Co.* v. *McIntosh*, 100 F. 2d 310, which also arose in Mississippi, the contractor had provided a side road or detour which turned off from the main highway in much the same manner as Hawkins Avenue turned off from the highway in

this case, and the contractor there at least had foresight enough to erect a barricade beyond the detour road to let travelers know that they were coming to the end, which was not done in the case at bar, and the contractor there also erected a detour sign to guide people out of the main highway and onto the detour road, which was not done here; furthermore, the contractor claimed that he had erected additional warning signs before the detour and barricade signs were reached, but there was a dispute in the evidence on this feature. McIntosh came over a small hill, traveling the main highway, in the daytime, ran past the detour road and wrecked his car and was injured in attempting to dodge the barricade sign. He sued and recovered judgment in the district court, which was affirmed on appeal, and the court pointed out these facts which are peculiarly applicable to the case at bar: "The evidence further disclosed that the detour road which branched off to the right, traveling North, was somewhat obscured by reason of the fact that it was lower than the main highway; that dirt had been piled at or near the point where the detour began, and was near and contiguous to the detour sign in the highway, which sign was small and could not be seen by occupants of automobiles coming over the hill until they were dangerously close to it. The evidence is in sharp conflict as to within what distance the barricade could be seen by drivers of approaching vehicles. There is also much conflict in the evidence as to the warning signs along the highway and as to the places where located." Upon these facts the circuit court of appeals held that the McIntosh case was one for decision by a jury and that "there is no merit in the contention of the appellant that it should have been granted a directed verdict."

The McIntosh case was also cited in the court below by petitioner, and the circuit court of appeals brushed down the decision with only two sentences, viz.: "In *Trinidad* v. *McIntosh* the detour sign and barricade in the main highway were small and could not be seen by oc-

cupants of automobiles coming over the hill until they were dangerously close to them. Moreover, the accident occurred on a section of road which was still under construction, and three witnesses other than McIntosh testified that they had wrecks at the barricade" (R. 462). Almost the same facts would apply in the case at bar. Hawkins Avenue, which occupied the same position as the detour road, and which was in fact a detour road, was badly obscured according to the voluminous evidence offered; the turn or intersection was covered with gravel from the new highway and the open space beyond was grown up with dead grass covered with dust from the highway, and, just as in the McIntosh case, could not be seen by occupants of automobiles until they were dangerously close to it. Moreover, this section of road was still under construction in respondent's care and charge, just as in the McIntosh case, and while in the McIntosh case the dangerous situation had existed for a considerable time and three other wrecks had occurred, in the case at bar it had existed for shortly more than twenty-four hours and three other cars had almost wrecked at the same place. While the facts are analogous, the circuit court of appeals in the McIntosh case quoted with approval from *Owens* v. *Fowler, supra*, as to the question of negligence in maintaining proper warning signals being a jury question, and held that it was likewise a question for the jury in the McIntosh case, notwithstanding the fact that there the contractor had admittedly erected one detour sign and one barricade, while in the case at bar the contractor did not claim to have put even one little sign or any other type of warning. The circuit court of appeals therefore not only refused to follow the law of Misssissippi as laid down by the Supreme Court of Mississippi, but also refused to follow its own prior decisions interpreting the law of Mississippi, thereby invading the province of the jury on the question of negligence in failing to maintain suitable warnings and

depriving petitioner of his constitutional right of trial by jury.

The quoted decisions of the Supreme Court of Mississippi and previous decisions of the circuit court of appeals construing the law of Mississippi are in perfect accord with the law as recognized by this court. In the instant case the circuit court of appeals went far afield as a basis for its decision in absolving respondent of negligence and pointed out that "In the case at bar the contractor opened the road at the request of the highway commission's field engineer" (R. 462). Even so, under the written contract in evidence, while the director of or the engineer for the highway commission had the right to direct the opening or closing of any section of the highway during construction, this did not relieve the respondent of the duty to erect and maintain warning signals, and it had no right to remove such signals from the highway, as it did do, "except upon written order of the engineer" (R. 199). Aside from its right to open and close sections of the highway during the progress of the work, the highway commission had no right to direct respondent or its employees in reference to their work, its supervision over the work was solely to the end that the highway commission got the road that it contracted for, leaving the methods and means of doing the work and constructing the road strictly to the contractor (R. 231).

The case of *Casement* v. *Brown*, 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582, fits the case at bar perfectly. In that case Casement & Company contracted with two railroad companies for the construction of a bridge across the Ohio River. Under the contract Casement & Company was to sink piers in the river and to maintain proper warning buoys for the protection of shipping along the river during the progress of the work. Because of its failure to maintain the proper warnings, three barges of coal were lost and suit was brought against Casement to recover the value thereof. This court discussed at

great length the provisions of the contract which were, briefly, that Casement & Company was to furnish all material and do all work in accordance with certain agreed plans and specifications, but at all times under the constant supervision of the railroads' engineers. This court pointed out that "The will of the companies was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the companies, the contract provided for their daily supervision and approval of material and work," and this court then said:

> "It is enough for this case that these defendants contracted to do this work and to produce a finished structure according to certain plans and specifications, and, having made such contract and engaged in such work in accordance therewith, they are responsible for all injuries resulting from their own negligence. While doubtless the original contract would cast upon the defendants as contractors the duty of taking all reasonable precautions, by buoys or otherwise, to warn those traveling on this public highway of any danger arising from their work, yet, in addition, it appears that there was a special contract by which they agreed to furnish the material and perform the work of preparing and keeping in place buoys and lights to warn against all danger. Surely, having made a contract to do the entire work, and in addition a special arrangement to keep proper buoys and lights in place to warn persons of danger, it does not lie in their mouths to say that their negligence and omission of this contractual duty cast no responsibility upon themselves."

In the instant case, just as in the Casement case, the contractor, in addition to the duty to warn imposed upon it by law, further contracted and agreed in writing to give proper warning of all dangerous situations for the safety of the traveling public, but the circuit court of

appeals, contrary to its own prior interpretations of the Mississippi law, and contrary to the above decision of this court interpreting the common law, sought to excuse respondent from its solemn written contract to give warning of danger simply because the road was opened "at the request of the highway commission's field engineer" (R. 462). This holding is so contrary to well-recognized principles of law as to justify an exercise of this court's power of supervision.

In the instant case, not only were the conclusions deducible from the undisputed facts in dispute, but the facts themselves on some of the main issues were in dispute. The circuit court of appeals has undertaken to weigh the evidence, to draw its own conclusions therefrom, and to resolve disputed facts bearing on the issue of negligence against the contentions and evidence sustaining the party for whom the jury found. Not only has the circuit court of appeals "decided an important question of local law in a way probably in conflict with applicable local decisions" but its decision is such a departure "from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision." Rule 38, 5 (b) of the rules of this court.

This court said in *Kreigh* v. *Westinghouse, C. K. & Co.*, 214 U. S. 249, 258, 53 L. Ed. 984, 988:

> "Questions of negligence do not become questions of law, to be decided by the court, except 'where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish.' *Gardner* v. *Michigan C. R. R. Co.*, 150 U. S. 349, 361, 37 L. Ed. 1107, 1110, 14 Sup. Ct. Rep. 140."

And, in *Grand Trunk Railway Co.* v. *Ives*, 144 U. S. 408, 417, 12 S. Ct. 679, 36 L. Ed. 485, 489, this court said:

> "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only when the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court."

Even the Circuit Court of Appeals for the Fifth Circuit adopted the same rule in the case of *Ballard* v. *Atchison, T. & S. F. Ry. Co.*, 100 F. 2d 162, citing with approval the case of *Richmond & Danville R. R. Co.* v. *Powers*, 149 U. S. 43, 13 S. Ct. 748, 37 L. Ed. 642, and, in fact, there are no decisions to the contrary, but the court failed to follow the rule in the instant case. The court's invasion of the exclusive province of the jury to weigh conflicting evidence and to determine what deductions are to be drawn therefrom was perhaps inadvertent. That fact, however, does not alter the petitioner's rights, nor does it diminish petitioner's expectation that a principle so well settled in this court will be reaffirmed by a review of the decision in this respect, as well as in respect to another important and independent ground yet to be discussed. As this court said in *Dimick* v. *Schiedt*, 293 U. S. 474, 486, 79 L. Ed. 603, 611:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

POINT B.

The Circuit Court of Appeals Erred by Invading the Province of the Jury in Peremptorily Determining That the Sole Proximate Cause of the Accident Was the Negligence of Petitioner in Not Having His Car under Proper Control As He Approached the End of the Highway.

Under this point Specification 3 will be discussed.

In its opinion the circuit court of appeals said, "The conclusion is inescapable that the failure of the appellee to have his car under proper control as he approached and entered the curve was the sole proximate cause of the accident" (R. 463). Before announcing this conclusion the court twice stated that petitioner was driving at a speed of 40 to 45 miles per hour within the corporate limits of the city of Columbia and maintained this rapid speed until it was too late to slow down and make the turn at the end of the highway (R. 460, 461).

The evidence established with little conflict that petitioner was driving at the stated speed of 40 to 45 miles per hour and it also established that petitioner had crossed the corporate limits of the city 350 feet before reaching the end of the highway and that he did not check his speed until he was upon or almost upon the intersection. However, the circuit court of appeals ignored the undisputed fact that petitioner's rate of speed was perfectly lawful at the place in question, and ignored the evidence which preponderated in favor of the petitioner's position that, and from which the jury had the right to infer that, the petitioner could not see the intersection because of its deceptive surroundings heretofore related, and was not aware that he was approaching the end of the highway; and while the circuit court of appeals cited the Mississippi statute to the effect that contributory negligence shall not bar a recovery but only serves to diminish the damages, nevertheless the court failed to apply that statute for it is clearly apparent from

the record that petitioner was at most only guilty of contributory negligence, as to which the district judge correctly charged the jury (R. 419); such negligence on the part of petitioner would serve to diminish his damages but would not bar a recovery by him under the Mississippi statute, Section 511 of the Mississippi Code of 1930,* quoted below, but the circuit court of appeals ignored the provisions of that statute and decided the case contrary to the law of Mississippi.

Reverting to petitioner's speed, the two people in the car with him and those in the best position to know, placed his speed at 40 to 45 miles per hour, as adopted by the circuit court of appeals (R. 20, 39). As above stated, this was a perfectly lawful rate of speed. The entire highway from the point of the wreck back up the road for a space of at least two miles was upon a new right of way through a wild and wooded area where there was not even one single house in sight nor even an acre of cleared land; as the witnesses described it, there was nothing but trees and bushes along the highway. There was no sign or marker at the corporate limits to let a traveler know that he had entered a municipality when he crossed the city limits 350 feet before reaching the intersection (R. 18, 41-42, 213). No lights from the town were visible to a traveler on the highway at this point and there was nothing whatever to let him know that he was entering a municipality (R. 18, 20, 21, 38, 78, 80, 85, 88, 98, 119, 132, 140, 149-151, 161). The general speed law of Mississippi is fixed by Section 51, Article VI, Chapter 200, of the General Laws of Mississippi of 1938, as follows:

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*Section 511 of the Mississippi Code of 1930 provides: "In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property or person having control over the property, may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property."

"1. Twenty miles per hour in any business district.

"2. Twenty-five miles per hour in any resident district.

"3. Fifty-five miles per hour under other conditions. Provided however the speed limit of trucks shall be forty miles per hour."

By Section 16, Article I, of the same Chapter 200, of the General Laws of Mississippi of 1938, these districts are defined as follows:

"(a) Business District: The territory contiguous to and including a highway when 50 per cent or more of the frontage thereon for a distance of 300 feet or more is occupied by buildings in use for business.

"(b) Residence District: The territory contiguous to and including a highway not comprising a business district when the property on such highway for a distance of 300 feet or more is in the main improved with residences or residences and buildings in use for business."

Section 52, Article VI, Chapter 200, of the General Laws of Mississippi of 1938, provides:

"Whenever local authorities within their respective jurisdictions determine upon the basis of an engineering and traffic investigation that the *prima facie* speed permitted under this act at any intersection is greater than is reasonable under the conditions found to exist at such intersection, such local authority shall determine and declare a reasonable and safe speed limit thereat, *which shall be effective when appropriate signs giving notice thereof are erected at such intersection or upon the approaches thereto.*"

Petitioner was not in any business district where the twenty mile speed limit applies, nor was he in any residence district where the twenty-five mile speed limit applies, and the conclusion is inescapable that on the occasion in question he was entitled to a speed of fifty-five miles

per hour. The municipality had no right to alter these speed limits except at intersections, and then only when signs were erected giving notice thereof after completion of an engineering and traffic investigation. No signs were erected at or upon the approaches to the intersection here involved, nor was such investigation ever made.

The city ordinance in evidence was adopted in 1921, pursuant to Chapter 116 of the Laws of Mississippi of 1916 (R. 367-370). With the repeal of the 1916 law by Section 159 of Article XVIII of Chapter 200 of the General Laws of Mississippi of 1938, which says, "all laws or parts of laws inconsistent with the provisions of this act are hereby repealed," the city adopted no further ordinance. It is elementary law that every municipality obtains its authority from the state and has no right to exceed the authority granted, and the state, through its legislature, has the right to change or revoke the authority at any time. The Supreme Court of Mississippi has so held, as to which see *Martin* v. *Dix*, 52 Miss. 53, and *Gillis* v. *Indian Creek Drainage Dist.*, 124 So. 262, 155 Miss. 160. Therefore, the ordinance was valid when adopted in 1921, because it was consistent with the state law then in effect, but it remained valid only so long as that law continued in effect, and when the state law as to speed limits was changed in 1938, the ordinance was no longer effective, and motorists became amenable to the state law only. Therefore petitioner was entitled to a speed of fifty-five miles per hour at the place and under the conditions heretofore related.

Furthermore, if petitioner had been engaged in violating the speed law either of the state or of the city, such violation would not bar a recovery by him, but would only serve to diminish his recoverable damages, as provided by Section 511 of the Mississippi Code of 1930, heretofore quoted. The Supreme Court of Mississippi has repeatedly held that violations of traffic laws by a plaintiff will not bar a recovery for damages sustained by him where the defendant has been guilty of negligence contributing there-

to, but that the negligence of the plaintiff will only diminish his damages. *Terry* v. *Smylie*, 133 So. 662, 161 Miss. 31; *Mississippi Power Co.* v. *McCrary*, 176 So. 165, 179 Miss. 427; *Frazier* v. *Hull*, 127 So. 775, 157 Miss. 303; *Solomon* v. *Continental Baking Co.*, 160 So. 733, 172 Miss. 388.

The circuit court of appeals, however, disregarded the law as settled by the Mississippi statute and decisions, and decided this case contrary to the established law of that state by holding in effect that petitioner was guilty of negligence in violating a speed law, and that such negligence would bar a recovery by him. This was directly in conflict not only with the authorities heretofore cited, but also Section 512 of the Mississippi Code of 1930, which says:

> "All questions of negligence and contributory negligence shall be for the jury to determine."

Furthermore, the circuit court of appeals held that petitioner's failure "to have his car under proper control as he approached and entered the curve was the sole proximate cause of the accident" (R. 463). It has long been settled that the question of proximate cause is a question of fact for decision by a jury and in this holding the circuit court of appeals not only disregarded the Mississippi law and the decisions of this court, but deprived petitioner of his constitutional right to a trial by jury.

> "If in an accident both parties be guilty of negligence, then the question of what was the proximate cause of the injury is a question of fact, to be submitted to the decision of a jury."
>
> *Illinois Central R. R. Co.* v. *Bethea*, 88 Miss. 119, 132, 40 So. 813, 815.

> "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It

is to be determined as a fact, in view of the circumstances of fact attending it."

Milwaukee & St. P. Ry. Co. v. *Kellog*, 94 U. S. 469, 474, 24 L. Ed. 256, 259.

The above rules are universal and are supported by numerous other decisions of this court and of the Supreme Court of Mississippi, but the circuit court of appeals disregarded the law requiring submission of the question of proximate cause to a jury for decision, and thereby deprived petitioner of the right to trial by jury guaranteed by the seventh amendment.

POINT C.

Assuming That the District Court Erred in Submitting the Case to the Jury, the Circuit Court of Appeals Erred in Directing Judgment Notwithstanding the Verdict Instead of Directing a New Trial.

This point covers specification No. 4. Assuming, contrary to petitioner's contentions, that there was not sufficient evidence to take the case to the jury on the issue of negligence, the judgment of the circuit court of appeals should have been for a reversal and order for a new trial because the only error claimed by respondent upon which there could be a dismissal of the case was the district court's failure to grant respondent a directed verdict, and it was error for the circuit court of appeals to dismiss the case upon that ground and enter a judgment for respondent notwithstanding the verdict for the reason that the district court was not asked to do so by proper motion after verdict as required by Rule 50 (b) and does not appear from the record to have refused to do so. By no procedure, formal or informal, was the district court's consideration directed to the making of such an order as the judgment of the circuit court of appeals makes. Hence, by this decision of the circuit court of appeals, the district court is put in error upon a proposition which was not even submitted to it and which it was not called upon to consider. Petitioner's discussion of his stated position will be subdivided.

(1) The Decisions of This Court Which Led to the Adoption of Federal Rule 50 (b) Show That Motions for Judgments Notwithstanding Verdicts Are Necessary to the Granting of Such Judgments upon Appeal.

New Federal Rule 50 (b) makes universally possible in federal practice the substance of the procedure approved by this court in *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 79 L. Ed. 1636, and in the dissenting opinion of Chief Justice Hughes in *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, 400, 57 L. Ed. 879. The discussion in the Chief Justice's opinion is thorough and is prophetic of the adoption of the present federal rule. He discusses the manner by which sufficiencies of evidence have been challenged in common-law courts and the points so raised preserved and disposed of postverdict with like effect as though determined before submission of cases to juries. He makes plain that whether the means be a demurrer to the evidence, a motion for a direct verdict, a conditional taking of a verdict with reserved questions of law, a motion for a judgment *non obstante veredicto*, a motion in arrest of judgment, or statutory equivalents or enlargements of these common-law conceptions, the substance remains the same. That substance is that the error in the grant or denial of a directed verdict is an error in the course of the trial, redressable only by the vacation of the trial and the granting of a new trial, unless means are taken to bring the matter into the record for disposition by the trial judge after the trial.

This is accomplished in all of the illustrations given in this learned opinion by steps in substance as follows: (a) reservation of the point when the case is submitted to the jury, and (b) submission of the point to the judge for decision after the verdict. The means by which these two steps have been accomplished have varied, some of them have been statutory, but without a compliance with the substance of these two steps an erroneous submission of the case has not been held, in the precedents collated in this opinion, more than an error in the course of

the trial calling for a new trial, and has not authorized a final dismissal upon appeal. What is lacking in the present record is the second of the two steps, which the review of the authorities made in the opinion shows to have been invariably taken to get into the record a ruling for or against a judgment by the trial court, on the affirmance or reversal of which a judgment could properly be directed in the appellate court notwithstanding the verdict of the jury. There was no submission to or consideration by the district court after the verdict of the question whether a judgment, despite the verdict, should be entered for respondent.

(2) Rule 50 (b) Contemplates Motions for Judgments Notwithstanding Verdicts.

The new Federal Rule 50 (b) grew out of the considerations just discussed and is merely an instrumentality to accomplish the reform which had been local to the states, notably Pennsylvania and New York, from which these leading cases came. It provides a means by which the above-mentioned two steps are taken to get into the record on appeal the question whether a final judgment contrary to the verdict and judgment below should be entered by the appellate court. By this rule the first step—the reservation of the point or the conditional submission to the jury—is made automatic and implied in the denial of a motion for a directed verdict by the trial court. The second step is to be taken by the party against whom the ruling was made on the motion for a directed verdict; he may move within ten days for a judgment in accordance with his prior motion for a directed verdict notwithstanding the verdict and judgment subsequent to that prior motion. This rule, which so expressly supplies automatically the first step or reservation, does not supply the second step or motion for judgment *non obstante veredicto*; that step must be affirmatively taken by the party who desires to secure the benefit of the rule.

If no motion is made for a judgment notwithstanding the verdict then the purposes of the procedure required by the rule, as explained in *Baltimore & C. Line* v. *Redman, supra*, that "it gave better opportunity for considered rulings" by the trial court, is defeated, and there is no unhurried second opportunity for the trial court to rule on the sufficiency of the evidence.

(3) This Court Has Definitely Decided That Motions for Judgments Notwithstanding Verdicts Are Necessary Before an Appellate Court Can Reverse and Enter Final Judgment on Appeal.

The question under discussion was decided by this court as it arose under the prior analogous state practice, and this court then held that where the motion for judgment *non obstante verdicto* was not made in the district court, that fact is sufficient reason for denying to the circuit court of appeals power on such a record to order final judgment contrary to the verdict below. This point appears from the following from the opinion of this court in *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389, 392, 394-395, 81 L. Ed. 1177, 1180, 1181:

> "The court refused to direct for plaintiff or defendants and, without reserving for later consideration the requests for directed verdicts or any question of law, submitted the cases to the jury. It found for defendants. Plaintiff filed motions for new trial but did not move for judgments *non obstante veredicto*. The court denied the motions and entered judgments for defendants. * * *
>
> "The applicable Pennsylvania statute provides that whenever, upon the trial of any cause, a point requesting binding instructions has been reserved or declined, the party presenting the point may move the court for judgment *non obstante veredicto;* whereupon it shall be the duty of the court, if it does not grant a new trial, to enter such judgment as should have been entered upon the evidence. From the judgment thus entered either party may appeal to the Supreme or Superior Court which shall review

the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court. As plaintiff failed to make appropriate motions in accordance with Pennsylvania practice, the district court did not err in failing to give plaintiff judgments notwithstanding the verdicts. The Conformity Act does not extend to the circuit court of appeals. In the absence of motions for judgments notwithstanding the verdict in the lower court, the appellate court was without authority to direct entry of judgments for plaintiff."

Since the adoption of Rule 50 (b), this court has thoroughly discussed and approved the rule in the recent case of *Montgomery Ward & Co.* v. *Duncan*, No. 30, October, 1940, Term, 85 L. Ed., Adv. Ops. No. 3, page 132, 311 U. S., Adv. Ops. No. 2, page 243, wherein this court said:

"The rule was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It does not alter the right of either party to have a question of law reserved upon the decision of which the court might enter judgment for one party in spite of a verdict in favor of the other. Prior to the adoption of the rule, in order to accomplish this it was necessary for the court to reserve the question of law raised by a motion to direct a verdict. The practice was an incident of jury trial at common law at the time of the adoption of the Seventh Amendment to the Constitution.

"Rule 50 (b) merely renders unnecessary a request for reservation of the question of law or a formal reservation and, in addition, regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct. It adds nothing of substance to rights of litigants heretofore existing and available through a more cumbersome procedure.

"A motion for judgment notwithstanding the verdict did not, at common law, preclude a motion for a new trial. And the latter motion might be, and often was, presented after the former had been denied. The rule was not intended to alter the existing right

to move for a new trial theretofore recognized and confirmed by statute. It permits the filing of a motion for judgment in the absence of a motion for a new trial or the filing of both motions jointly or a motion for a new trial in the alternative.

"Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."

In addition to the last-cited case, certiorari was also granted by this court for a consideration of Rule 50 (b) in the recent cases of *Conway* v. *O'Brien*, No. 344, October, 1940, Term, 85 L. Ed., Adv. Ops. No. 9, page 574, not yet officially reported, and *Berry* v. *United States*, No. 336, October, 1940, Term, 85 L. Ed., Adv. Ops. No. 9, page 576, not yet officially reported

Rule 50 (b) not only requires the filing within ten days after verdict of a motion for judgment in accordance with the original motion for a directed verdict, but further provides that a motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. In this case respondent did not move for a judgment notwithstanding the verdict; it only moved for a "new trial or corrected judgment" (R. 445) and the order overruling merely recites that the motion for a new trial is overruled (R. 447). The respondent neither prayed for a judgment *non obstante*

veredicto not did it seek any ruling regarding such judgment, and in its notice of appeal it merely complained at the overruling of the motion for a new trial and nothing more (R. 448). Under the plain provisions of the rule, a motion for a judgment notwithstanding the verdict is one thing and a motion for a new trial is an entirely different thing; to obtain the benefit of both, it is necessary to make both motions, and they may be made separately with the appropriate prayer in each, or they may be joined with an appropriate prayer in the alternative. This is the plain provision of the rule, and it is then the duty of the movant to first seek from the trial court a ruling on his motion for judgment, which may or may not conclude the matter, but, if not thereby concluded, then it is movant's duty to seek a ruling on his motion for a new trial. This is made clear from the opinion of this court in *Montgomery Ward & Co.* v. *Duncan, supra*, where in 85 L. Ed., Adv. Ops. No. 3, page 138, 311 U. S. Adv. Ops. No. 2, page 243, this court said, *inter alia*:

> "If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon he should also rule on the motion for a new trial, indicating the grounds of his decision. If he denies a judgment n. o. v. and also denies a new trial the judgment on the verdict stands, and the losing party may appeal from the judgment entered upon it, assigning as error both the refusal of judgment *n. o. v.* and errors of law in the trial, as heretofore. The appellate court may reverse the former action and itself enter judgment *n. o. v.* or it may reverse and remand for a new trial for errors of law."

In the instant case the respondent never did make a motion asking for a judgment notwithstanding the verdict; the motion for a new trial falls far short of complying with Rule 50 (b); while, as grounds for a new trial, the motion did recite that the court should have su-

stained the prior requests for a directed verdict, nevertheless the motion did not anywhere ask the trial court to now enter judgment in accordance with said prior motions, but only asked the court to grant a new trial "or corrected judgment" (R. 445). The words "corrected judgment" do not mean a final judgment notwithstanding the verdict. A pleading should be construed most strongly against the pleader. Applying this rule, the request for a "corrected judgment" could have meant that the respondent desired a remittitur in the amount of the judgment, as one of the points raised in the motion was that the verdict was excessive (R. 446). Unless and until respondent makes known to the trial court a definite desire and request for a judgment *non obstante veredicto,* the trial court should not be put in error for failing to grant such a judgment, and in the absence of such definite motion and request in the trial court the circuit court of appeals should not have entered such judgment upon its reversal, expecially when there was no prayer in the alternative therefor as required by Rule 50 (b).

The practical advantage to the parties in having the motion for judgment *non obstante veredicto* made and considered in the trial court, where the alternative action permitted by the rule is a new trial, and where only this discretion can be wisely exercised, is well recognized in the case of *Pruitt* v. *Hardware Dealers Mutual Fire Ins. Co.,* 112 F. (2d) 140, from the Fifth Circuit Court of Appeals. That opinion was written by Circuit Court Judge Sibley, who did not sit on the hearing of the instant case by that court. It is plainly evident here that the judges who did participate in this case failed to follow that decision and also failed to follow the provisions of Rule 50 (b) itself, as well as the decisions of this court interpreting that rule, when they ordered a final dismissal of petitioner's suit instead of remanding it for a new trial.

VII.

CONCLUSION.

It is respectfully submitted that the errors of the circuit court of appeals, above discussed, in holding that the district court erred in not directing a verdict for the respondent, and in directing a judgment notwithstanding the verdict instead of directing a new trial, are such as to call for review and determination by this Honorable Court in order that justice may be done to petitioner.

Respectfully submitted,

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(2)

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 218.

GEORGE H. HAYES, JR., PETITIONER,

VS.

C. C. MOORE CONSTRUCTION COMPANY, INC., A CORPORATION, RESPONDENT.

RESPONSE OF C. C. MOORE CONSTRUCTION COMPANY, INC., A CORPORATION,

to

PETITION FOR WRIT OF CERTIORARI OF GEORGE H. HAYES, JR.

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RESPONSE OF C. C. MOORE CONSTRUCTION COMPANY, INC., A CORPORATION,

to

PETITION FOR WRIT OF CERTIORARI OF GEORGE H. HAYES, JR.

May It Please the Court:

The response of C. C. Moore Construction Company, Inc., a corporation, respectfully shows to the court:

I.

OBJECTIONS TO SUFFICIENCY OF PETITION AND JURISDICTION OF THE COURT TO GRANT WRIT OF CERTIORARI.

1. There Is Total Absence of Substantial Federal Question or Case of Gravity and Importance Presented in Petition. The law authorizing the issuance of certiorari contemplates that a means may be available to require a uniformity of rulings in the different circuit courts of appeals, as well as the disposition of cases whose gravity and importance render the action of the Supreme Court peculiarly desirable. The factual background for the petition is that the Circuit Court of Appeals for the Fifth Circuit reversed a trial court in permitting judgment based on jury verdict to withstand attack of the defendant on motion for a new trial or rehearing. The basis for the jurisdiction of the federal court was diversity of citizenship. There was no federal question involved in the trial court or in the circuit court of appeals. The case has no public value or importance, and, as we contend, is not that class of cases where this court is expected to sustain a petition for writ of certiorari.

The power given to the court to sustain petition for writ of certiorari is comprehensive and unlimited, but is to be exercised sparingly, and only in cases of general importance. One authority has said that it will be exercised only when the circumstances of the case satisfy the court that the importance of the question involved demands the exercise of the power.

> "The decree that was to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application; besides which it appears by reference to our files that the application was opposed by the present petitioner upon the

ground that the case, however important to the parties, involved no question of public interest and general importance, nor any conflict between the decisions of state and federal courts, or between those of federal courts of different circuits."

Hamilton-Brown Shoe Company v. *Wolf Bros. & Co.*, 240 U. S., p. 251, 36 S. Ct. 269, 60 L. Ed. 629.

As we shall hereafter point out, there is not involved a principle of far-reaching importance in the cause sought to be presented to this court, and it is subject to be dismissed because of the absence of a principle in which the public will be either directly or indirectly interested. The judgment of the circuit court of appeals in this case should be and is under the law, as we view it, final. We believe that this position of ours is supported by law and sound reasoning.

"Coming to consider the record, we conclude that it establishes that the doubt suggested by the government is well founded and therefore if we were to consider and decide the case, we would but review the action of the court below in regard to a question as to which under the Judiciary Act of 1891 (26 Statutes at Law 826. Chapter 517, United States Compiled Statutes 1901, page 488) the action of the court was final, and which, neither from its character nor importance, was within the scope of the grant of power to review by certiorari."

U. S. v. *Daniel J. Rimer et al.*, 220 U. S. 547, 31 S. Ct. 596, 58 L. Ed. 578.

2. Petitioner's Question Respecting Violation of Seventh Amendment to Federal Constitution Does Not Exist in the Record. A constitutional question is not subject to review on appeal unless the court from which the case comes has been given an opportunity to consider the same. The petitioner here did not file an application with the Circuit Court of Appeals for the Fifth Circuit for a rehearing and did not attempt to raise the constitutional question mentioned. Rule No. 29 of the United

States Circuit Court of Appeals for the Fifth Circuit, adopted on February 1, 1939, and dealing with a rehearing, is as follows:

> "A petition for a rehearing may be presented only within twenty-one days after entry of judgment, unless by special leave granted by the court, or one of the judges. It shall be printed, and must briefly and distinctly state its grounds without argument and be supported by certificate of counsel; and will not be granted or permitted to be argued unless a judge who concurred in the judgment desires it and a majority of the court so determines. Twenty copies must be filed."

If petitioner intended to raise the constitutional question of right of trial by jury and of his being deprived thereof through opinion of the Circuit Court of Appeals, he should have caused this question to be called to the attention of the appellate court on motion or petition for rehearing, and his failure so to do bars him from making such a contention in and before this court. There is no exception to the rule, as we understand, that a constitutional question of the nature here mentioned must be called up before the court where judgment is brought in review.

> "The general rule that questions not raised in the lower court will not be considered in the appellate court, has been held to preclude a party from questioning the constitutionality of a rule of court for the first time on appeal or writ of error."
>
> Paragraph 609, 3 Corpus Juris, page 712.

> "When the jurisdiction of the appellate court is dependent upon the existence of a constitutional question, the record must show clearly that the question was properly raised in the trial court, and was decided there."
>
> Paragraph 1621, 4 Corpus Juris, page 45.

> "And although it may appear a constitutional question was involved in the trial court, unless such question is preserved in the record and the ruling of the court thereon is assigned as error, the question

will not be considered by this court, but the appeal or writ of error will be dismissed."

Griveau v. *South Chicago City Ry. Co.*, 213 Ill. 633, 73 N. E. 309.

See, also:

Wabash Ry. Co. v. *City of St. Louis*, 64 F. 2d 921, and on certiorari, 54 S. Ct. 88, 290 U. S. 668, 78 L. Ed. 577.

Alabama Brokerage Company v. *Boston*, 93 So. 289, 18 Ala. App. 495.

Transport Utilitor Sales Co. v. *Zwergel*, 199 N. W. 668, 228 Mich. 132.

Nathan v. *Equitable Trust Co.*, 165 N. E. 282, 250 N. Y. 250.

3. Petitioner's Question Respecting Application of Rule 50 (b) of the New Rules of Civil Procedure Affecting Federal Courts, Has No Application Here. Said rule does provide that "within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict." In this case, a motion for a directed verdict was properly presented to the trial court and overruled. After the verdict, a motion for a new trial or corrected judgment was filed just as contemplated by said Rule 50 (b). The order of the court identified the motion properly, and held that same was not well taken and should be overruled but in the last paragraph of the order overruling the motion, the corrected judgment feature of the motion is not mentioned. It is contended that the motion and order thereon are not sufficient to make it possible for the circuit court of appeals to enter judgment for appellant. However, in truth and in fact, the circuit court of appeals did not cause judgment to be entered for appellant. A copy of the judgment of the circuit court of appeals appears at page 463 of the record, and which judgment is in its entirety as follows:

"This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration thereof, it is now here ordered and adjudged by this court that the judgment of said district court in this cause be and the same is hereby reversed.

"It is further ordered and adjudged that the appellee, George H. Hayes, Jr., be condemned to pay the costs of this cause in this court, for which execution may issue out of the said district court."

There is nothing in the judgment which would indicate that same has been made final in favor of the C. C. Moore Construction Company in the circuit court of appeals. We, of course, claim and contend that the record justified such a judgment to be entered in favor of the appellant, but this was not done, and upon no stretch of the imagination can it be said that there has been any violation by the circuit court of appeals of any part of said new rule of civil procedure bearing number 50 (b). We believe that the motion filed for the defendant for a corrected judgment and the order thereon were sufficient to justify the circuit court of appeals to enter judgment for appellant. Said court, however, did not cause judgment to be entered for the appellant, but only reversed the trial court. Petitioner does not contend that a motion under Rule 50 (b) was not made by the defendant within the ten-day period after verdict and judgment, but he is contending, as we understand, that the order of the trial court based on the motion is not all-inclusive. By way of parenthesis we would want to quote from remarks of Honorable William D. Mitchell, Chairman of the United States Supreme Court's Advisory Committee on the Federal Rules of Civil Procedure, Proceedings of the American Bar Association Institute, Cleveland, 1938, at page 315:

"We do not by this rule make it necessary for the trial court even to say 'I am reserving the question

> of law.' That is a form anyway, and we make it safe in all cases by the device of prescribing that wherever he refuses to grant a motion for directed verdict, he is deemed to reserve the question of law, taking the verdict subject to his later determination, and consequently may on motion afterwards set aside the verdict, grant judgment notwithstanding, and the circuit court of appeals may take the same action."

In conclusion on proposition here presented that the application of petitioner for writ of certiorari is insufficient, we desire to mention Rule 5 of the Supreme Court of the United States, adopted February 13, 1939, as amended, which provides that "a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are *special and important reasons therefor.*" Under said Rule 5 and Subsection (b) thereunder, it is said that where a circuit court of appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court," the court will consider same in exercising its discretion on an application for writ of certiorari. There are no special and important reasons why a writ of certiorari should be issued here. There is no important question of local law in conflict with applicable local decisions involved, and there is not involved an important question of federal law which has not been settled by this court. Rule 50 (b) was not applied by the Circuit Court of Appeals for the Fifth Circuit in this case. The appellate court has passed upon the record just as if there were no compliance by appellant, respondent here, with said Rule 50 (b) in presenting motion for judgment within ten days after verdict was returned. The questions presented in petition of petitioner for relief sought are without foundation in the record, and there exists no legal reason for the sustaining of the petition for the writ sought.

II.

RESPONSE PROPER OF THE C. C. MOORE CONSTRUCTION COMPANY, INC., A CORPORATION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

1.

History of Case.

This cause arose in the District Court of the United States for the Hattiesburg Division of the Southern District of Mississippi, and the jurisdiction of the federal court depends entirely upon the diversity of citizenship. There was a trial resulting in judgment for the plaintiff in the trial court, and on appeal the trial court was reversed but there was no judgment entered in favor of the appellant in the Circuit Court of Appeals for the Fifth Circuit. The court held that the defendant's motion for an instructed verdict should have been granted, and the last sentence in the opinion is that "The judgment is reversed" (R. 463).

2.

Statement of Pleadings.

Petitioner's complaint alleged that the C. C. Moore Construction Company had a contract for construction of a new highway from Hawkins Avenue in the city of Columbia, Mississippi, for a distance of approximately ten miles to the north, to become Mississippi Highway No. 13, and that on the 10th day of September, 1939, the complainant was driving an automobile in the nighttime on the new highway which was practically completed and surfaced with

gravel, and that his automobile was in good condition and the new highway was in good condition, and that complainant came to the intersection at a rapid rate of speed and did not see the intersection until it was too late to check the speed of his automobile to make the curve, and that the inside angle for a right turn to a southbound automobile as the one involved would be from 110 to 120 degrees, and that complainant failed to negotiate the curve and turned over the car, seriously injuring himself.

The answer of the defendant was a denial of all charges of negligence, and in addition thereto a claim that the complaining party caused his own injury by driving at an excessive rate of speed and by failing to keep a proper lookout, as the law required of him to do.

3.

Statement of Facts.

We desire to mention the existing facts briefly, and only those facts which required the circuit court of appeals to reverse the trial court on the theory that the pleadings and proof were not sufficient to support judgment. The complaining party was driving the automobile at a rate of speed of from 40 to 45 miles per hour, on a new highway which is generally identified by witnesses as being in perfect condition. Plaintiff was injured in the accident and he had no recollection or impressions as to the speed of his automobile at the time of the accident, or as to what, if any lookout was maintained by him respecting the end of the new road and his duty to make a right or left turn on Hawkins Avenue in the city of Columbia, Mississippi. In so far as the record goes, it may be that Hayes was not keeping any lookout whatsoever. He was only twenty-one years of age, and had riding with him a young woman and a young man, both of whom were minors. They were on their way to pick up another young woman with whom the plaintiff had a date. A great number of other individuals,

who testified on the trial, came over the same road and around the same curve complained of, on the very night of the accident. None of them had an accident. All of them negotiated the curve with safety. Hawkins Avenue is a paved street. G. W. Williamson, father of one of the occupants of the automobile involved in the accident, came over the new road and onto Hawkins Avenue, a paved street, and was travelling down said street before he knew he was in the city of Columbia (R. 73-82). Shelby Coulter and his wife and Mrs. Robert Parker, mother of the other occupant of the automobile involved in the accident, came over the same new highway, and testified that it was in excellent condition and they made the curve into Hawkins Avenue without an accident (R. 82, 87 and 154). W. D. Corley and Mrs. W. D. Corley came over the particular highway and scene of the accident on the night thereof and after the accident had occurred. They were driving 45 miles per hour, and slowed down for the curve (R. 126 and 133). Sebe Dale, district attorney, came over the new highway and passed the scene of the accident on the night thereof, without an accident (R. 148). Miss Dell Hayes, George H. Hayes, Sr., and wife, sister, and father and mother of plaintiff, came over the road in question on the night of the accident and passed the scene of the accident and made the curve with safety (R. 158, 162 and 169). All these parties were witnesses for the plaintiff.

The particular intersection involved in the litigation by measure shows an inside angle of 120 degrees to 127 degrees. There were photographs of the scene of the accident, which, by agreement, became a part of the record on appeal and which we assume will be available for use in this court if necessary. The place where the accident occurred is inside the corporate limits of the city of Columbia, Mississippi, where there is in existence an ordinance which fixes the speed limit at fifteen miles an hour. The Mississippi state law fixes the speed limit in

a residential district, where this accident occurred, at twenty-five miles per hour (see p. 39 of petitioner's brief). All the witnesses agree that at twenty-five to thirty miles an hour one could make the curve without any difficulty whatsoever.

4.

Proceedings at the Trial.

It is correctly stated in petition for writ of certiorari that respondent moved for a directed verdict which was overruled at the conclusion of testimony for plaintiff, and that the motion was renewed at the conclusion of all the evidence and again overruled, and a written motion was then filed and presented to the court for a directed verdict, and which motion was overruled (R. 200, 412-13 and 442-4).

5.

Proceedings in District Court After Judgment.

Within ten days after the verdict, and, in fact, immediately after the verdict was rendered, a motion was filed for respondent for a new trial or corrected judgment. This motion was overruled. Said motion had as its first ground the error of the court in overruling motion for directed verdict at the conclusion of petitioner's testimony. The second ground for said motion complained of the court's overruling oral and written motions made for the respondent at the conclusion of all of the testimony, and also complained of the court's refusing to grant the written peremptory instruction requested for the respondent (R. 445-6). This motion was intended to comply with Rule 50 (b), and seeks order for "corrected judgment." It is true that the order of the court thereon, in the last part of the order, identifies only the motion as one for a new trial. However, the first part of the order provides that there came on for hearing motion for a new trial "or cor-

rected judgment." It was only a typographical error in not identifying the motion, but whatever the motion was, it was overruled, and under Rule 50 (b) of Rules of Civil Procedure for district courts of the United States, the circuit court of appeals could have caused appropriate judgment to be entered.

6.

Proceedings in the Circuit Court of Appeals.

The cause was argued before the circuit court of appeals, and when said court determined that the complaining party admitted in his pleadings and proof that the road constructed by respondent was in perfect condition and that the automobile was being driven at 40 to 45 miles an hour, and that a right turn could have been made into Hawkins Avenue in the city of Columbia at a 120 degree to 127 degree inside angle, and that the road was in perfectly good shape, and the street intersecting with the road was in good shape, the court desired to hear from attorneys for the complaining parties. It was recognized in said court that the sole proximate cause of the accident and injury in question was the conduct of the driver of the automobile, and not the condition of the highway which had been built by respondent, or any fault or negligence of the respondent. The appellate court could have taken advantage of the terms and provisions of said Rule 50 (b) and caused appropriate judgment to be entered for respondent in the appellate court. However, the appellate court elected only to reverse the trial court. There was no order entered as seems to be contended by petitioner. There was no judgment entered by the circuit court of appeals in favor of respondent.

It is pointed out that respondent should have given warning to the travelling public, but in so far as this record shows no warning was required at the intersection for anyone excepting petitioner. He was the only one who suffered any loss by virtue of the excellent condi-

tion of the highway built by respondent and the 120 to 127 degree angle which the travelling public must make in going from the new highway into the hard-surfaced Hawkins Avenue in the city of Columbia. Even if respondent had a duty to put up signs, the testimony does not show any causal connection between the absence of signs and the accident and injury complained of. There might have been a sign opposite the end of the new road and on the south side of Hawkins Avenue, but such a sign would have been placed on property over which the contractor had no control. The new road ran approximately north and south. Hawkins Avenue ran in a northeasterly and southwesterly direction. Nothing that the contractor was required to do, or could have done, might have in any way connected itself with the accident and injury complained of.

It is contended that the holding of the appellate court that the testimony was not sufficient to create a question of fact for the jury violated the Seventh Amendment to the Federal Constitution, in that the injured party was denied the right of a trial by jury. In this connection, we might point out that if the analysis of testimony by an appellate court, and a reversal of the trial court because of the insufficiency of the testimony, constitutes a violation of an individual's right of trial by jury, then every time a case is reversed on this ground in any appellate court in this country there arises a constitutional question which would call for a review by this court on petition for writ of certiorari.

It must be remembered that the motion for a new trial or corrected judgment, after identifying the movant, "moves the court to set aside the verdict of the jury and the judgment entered thereon" * * * and grant to the defendant a new trial or corrected judgment. In short, the motion seeks a new trial, or, in the alternative, a corrected judgment, just as is contemplated by said Rule 50 (b) which provides that "a motion for a new trial may

be joined with this motion, or a new trial may be prayed for in the alternative." It must be further remembered, however, that said Rule 50 (b) has no application because there was no judgment entered for respondent in the appellate court, and there was no dismissal of the complaint. The only order entered was that of a reversal of the trial court, as has heretofore been pointed out.

QUESTIONS PRESENTED.

Petitioner contends that the circuit court of appeals has deprived him of his right to a trial by jury and that said court has violated Rule 50 (b) of the New Rules of Civil Procedure. We have already pointed out that it does not constitute a denial of right of trial by jury where the only complaint is that the appellate court concludes that there is an absence of negligence, or that there is no liability. We may again state that Rule 50 (b) could have no application here since the appellate court did not reverse the trial court and cause judgment to be entered on appeal. If anyone had a right to complain, it would be respondent which was really entitled to a judgment at the hands of the appellate court. In view of all the above, the respondent seeks a denial of the petition at the cost of the petitioner.

III.

ARGUMENT FOR RESPONDENT.

INTRODUCTORY STATEMENT.

For convenience we shall deal with the argument under same headings as used by petitioner, and in a large measure it will be our purpose to seek to furnish authority in contradiction of contentions of the supporting statements in brief for petitioner.

1.

The Circuit Court of Appeals Correctly Held That Respondent Was Guilty of No Negligence.

We thoroughly agree with petitioner that under the law the plaintiff is entitled to the most favorable inferences deductible from the evidence and to the rejection of the unfavorable ones, and it is further true that the law existing in Mississippi on questions of negligence shall control. In the case of *Myers* v. *Sanders*, 194 So. 300, 189 Miss. 198, quoted from by petitioner, there was involved the obligations of a road contractor. The injured party passed barricade signs and ran into an obstruction in the new road. The question of negligence and reasonable care were discussed and the Mississippi Supreme Court held that the trial court should have instructed the jury to find for defendant, and in the particular case, identified at page 26 of petitioner's brief, the Supreme Court reversed the trial court and caused judgment to be entered in the appellate court, and in reaching the conclusion that the case should not have been submitted to the jury, the court said:

> "A contractor would not be required to keep lights during the daytime on all piles of road material needed on the highway during the obstruction, nor should he be required to construct effective barricades around such materials, where, in all probability, the barricade would have likewise been obscured by the denseness of the dust through which the occupants of this truck say they were passing in approaching the scene of the accident; and which attempted safeguards may have only tended to increase the danger, rather than provide a protection. They were not justified under the law, in proceeding through the dust at unslackened speed, under the assumption that a road under construction was free of obstructions.
>
> "From the foregoing views, it necessarily follows that the peremptory instruction requested by the appellant should have been granted.
>
> "Reversed, and judgment here for the appellant."

The real problem for petitioner before the trial court, before the circuit court of appeals and here is to show that petitioner as driver of the motor vehicle was keeping the machine under control, and alert as required by the laws of Mississippi when the accident occurred. In the case of *Graves et al.* v. *Johnson et al.*, reported in 179 Miss. 468, 176 So. 256, the court stated that:

> "Completed and accepted roads are not required to be in such condition as to insure the safety of reckless drivers."

We might state that the above case was cited with approval by the circuit court of appeals in deciding against petitioner on the question of negligence. The appellate court could reach no other conclusion but that the speed of the petitioner's automobile was the sole proximate cause of the accident and injury in question.

The circuit court of appeals further identified the case of *Coca-Cola Bottling Words* v. *Hand*, (Miss.) 191 So. 674, as supporting conclusion reached that the construction company was in no way guilty of negligence which caused or contributed to the accident. An automobile truck was involved in the particular case, and a judgment was rendered on the verdict of a jury in the Circuit Court of Leflore County, Mississippi, for the sum of $20,000. There was an appeal to the Supreme Court of the State of Mississippi. The principal question before the appellate court dealt with whether or not the injured party used due care for his own protection, or if his failure to drive with care or caution was the cause of the accident. As in the case before the court, the plaintiff was identified through testimony furnished for him as driving the automobile at the rate of speed from 45 to 50 miles an hour. In reversing the trial court and causing judgment to be entered on appeal, the Mississippi Supreme Court announced the following principle:

> "and in order to avoid prolonging the opinion further, we will refrain from discussing the numerous cases

cited in the briefs, except to say that in our opinion they are not controlling here; and for the further reason that, after a careful consideration of all the undisputed evidence, and resolving any conflict in the remaining evidence in favor of the appellee, the conclusion is inescapable that the failure of the appellee to have his car under proper control as he approached the intersection was, in our opinion, the sole proximate cause of this unfortunate accident; and the court below erred in not granting the peremptory instruction requested on behalf of the appellants.

"Reversed, and judgment here for the appellants."

It is pointed out by petitioner in argument made to support theory that writ should issue, that the Circuit Court of Appeals for the Fifth Circuit correctly applied the Mississippi law in three road contractors' cases decided just prior to the presentation of the Hayes case to said court. There is first identified the case of *Owens* v. *Fowler*, 32 F. 2d, p. 238. Two phases of this case will be discussed by us. In the first place, the case deals with a set of facts where there was a real danger existing. A cut across a new road 12 feet deep existed. The road was under construction. The contractor had not completed the work. The contractor had full knowledge of the danger existing from the road's abrupt termination at the railroad cut. The contractor permitted the public to use the road, with this knowledge. No such facts appear through the testimony shown from the record in the cause now before the court. In the second place, the court pointed out that on the question of negligence respecting the erection of proper barricades, warning and detour signs, the evidence was conflicting, and the conflicting evidence was properly left to the jury. The court recognized that if there had been no conflict in the evidence, there would have been no question of fact for determination by the jury. The case of *Owens* v. *Fowler, supra*, falls in that class of cases where the facts show the existence of a pitfall. When giving consideration to this case, the circuit court of appeals pointed out that "In *Owens* v. *Fowler*, the road which was under

construction ended abruptly and without warning, at a deep railroad cut, and an automobile ran over the dump at the end of the road and into the cut and its three occupants were killed."

The next of the three cases from the circuit court of appeals which petitioner had relied upon, and which were differentiated from the case at bar, in the opinion of the court, is that of *W. G. Wetmore & Company* v. *Reed*, 98 F. 2d 532, which also originated in Mississippi. Why this case has been identified as authority for petitioner we cannot determine. There were two parties being sued in the particular litigation. One of these parties was a Mr. Neely who had contracted to do the grading of the road up to a bridge over a river and for a distance of about 3.6 miles. The other defendant, W. G. Wetmore & Company, Inc., had the contract to build the bridge. Neely had completed his work. He had been requested by the district engineer to remove the barricade. No request had been made by the district engineer of either Neely or Wetmore to post signs warning the public not to use the road. There were no signs notifying the public that the road was not open. On the night of the accident the deceased, G. V. Reed, drove into the barricade and was injured, resulting in his death. The defedant Neely in said case held an identical position with that of the respondent here, and the court said of Neely's liability:

> "We consider there was sufficient evidence to go to the jury on the question of negligence on the part of Wetmore. A different situation is presented as to Neely. Neely had nothing further to do with the construction of the road. So far as his work was concerned, the road was safe. His duty to warn and protect the public against any danger incident to his work was at an end before the accident. *Herring* v. *Planters Lumber Company*, 169 Miss. 327, 153 So. 164; 45 C. J. 884, Par. 320—Negligence. It would be a matter of pure speculation for the jury to find that Neely was guilty of any negligence that could have been the prox-

imate cause of the accident, or contributory thereto. The judgment against him is not supported by any substantial evidence."

It is undisputed that New Highway No. 13 constructed by respondent had been completed and was in perfect condition. There was no complaint that the accident resulted from any unsafe condition of the highway itself. It is only claimed that the contractor should have warned the public of a condition existing beyond the end of the project. Just as is said in the case of *Wetmore* v. *Reed*, we say here that respondents duty to warn and protect the public against any danger incident to its work was at an end before the accident, and petitioner is not entitled to further consideration.

The third case arising in Mississippi and decided by the Circuit Court of Appeals for the Fifth Circuit, and relied upon by petitioner before said court of appeals, is that of *Trinidad Asphalt Manufacturing Company* v. *McIntosh*, 100 F. 2d, p. 310. Said case arose in the United States District Court for the Northern District of Mississippi. There was a judgment for the plaintiff and an appeal to this court. The injury complained of resulted from the presence of a barricade sign improperly placed. The barrier was near the bottom of an incline. Dirt had been piled at or near the point where the detour began and the detour sign was small and could not be seen by occupants of automobiles coming over the hill until they were very close to it. In that case, there was testimony of three individuals that they had wrecks at the particular place. In the case involved in petition before this court, there is no testimony that any other person has ever had, before or since petitioner was injured, an accident of any kind at the intersection of new Highway No. 13 and Hawkins Avenue in the city of Columbia, Mississippi. As far as the record goes, not a single other accident occurred at the place. Petitioner was the lone speed law violator who drove so fast that he could not

negotiate the simple curve at the south end of the new highway. In the McIntosh case, the court pointed out the undisputed evidence respecting the other automobile accidents occurring at the place in question. The circuit court of appeals in case of petitioner, said of the McIntosh case:

> "In *Trinidad* v. *McIntosh*, the detour road to the right 'was somewhat obscured,' and the detour sign and barricade in the main highway were small and could not be seen by occupants of automobiles coming over the hill until they were dangerously close to them. Moreover, the accident occurred on a section of road which was still under construction, and three witnesses other than McIntosh testified that they had wrecks at the barricade."

The case of *Casement* v. *Brown*, 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582, has no application here, and for the reason that the question of a independent contract came into play. The problem of the circuit court of appeals in the case at bar was to decide whether or not respondent was guilty of negligence, and if guilty of negligence, whether or not its negligence caused or contributed to the accident. The conclusion was that respondent was in no way guilty of negligence which caused or contributed to the accident, and the cases of *Graves* v. *Johnson* and *Coca-Cola Bottling Company* v. *Hand*, being Mississippi cases and hereinabove identified, were cited with approval. We thoroughly agree with our opposition in authorities quoted, that the jury is a fact-finding body, and that its place must be maintained, but there was no substantial testimony to justify a conclusion that plaintiff was guilty of negligence. In this connection we might point out that the scintilla of evidence rule is not recognized by the courts of Mississippi and that verdicts must be based upon substantial evidence.

> "The scintilla of evidence rule has been discarded in nearly all jurisdictions, and is not recognized in this state; but verdicts must be based upon

substantial evidence, and that evidence must be reasonably believable. Whatever a jury here or there might chance to believe, we must require that the evidence upon which they act must be within statewide legal standards, and one of these, as said, is that the evidence must be substantial and must be reasonably believable."

Y. & M. V. R. R. Co. v. *Lamensdorf*, 180 Miss. 426, 177 So. 50.

See, also:

Mutual Benefit, Health & Accident Assn. v. *Johnson*, (Miss.) 186 So. 297.

Mayfield v. *Aetna Life Ins. Co.*, (C. C. A. 5th, 1938) 100 F. 2d 199.

Shapleigh v. *United Farms Co.*, (C. C. A. 5th, 1938) 100 F. 2d 289.

Even if we were to concede, for the sake of argument, that respondent was guilty of negligence, still, the court in considering the record as a whole could come to no other conclusion than that there was no causal connection between such negligence, if any, and the accident and injury complained of. The pleadings and proof are to the effect that the new highway built by respondent was in perfect condition at the time of the accident. It is not claimed that there was something wrong with the roadbed itself, or with the road on which the petitioner was riding. If there was anything wrong, it was that the roadbed was too good and petitioner was driving too fast for his own safety. The complaint made deals with the curve to be made when one goes out of the south end of the new road and into a paved street in the city of Columbia. The new road was perfect. No complaint was made of the city street. The turn to be made by the southbound travelling public to go into the city of Columbia was not a right angle turn. It was greater than two-thirds of a straight angle. The inside angle was 120 degrees or more. The Supreme Court of Mis-

sissippi has said that no warning sign is required even as to a right angle turn in a municipality. We dare say that there are few dead end streets in the cities of the south, or of this entire country, where there are warnings placed for those travelling on the streets to point out to the motorist that he is about to approach the end and must make a right or left turn. There are many highways that are maintained by the highway departments of the several states and by the United States of America, which do not have signs thereon. In a case passed on by the Supreme Court of Mississippi a great many years ago, it was held that a driver of a motorcycle who came to the end of a street in a municipality and who ran over the intersection and was killed, could not through his heirs at law claim that there was negligence because of the absence of a warning sign, and the court further held that there could be no recovery. In that particular case, there was not only involved a municipality, but also a traction company, and the Supreme Court of Mississippi held that neither the municipality nor the traction company was responsible for the accident. A great many years have passed, but the rule as announced in said case has not been reversed or modified.

> "The statutes of the state limit the speed of motor vehicles on highways situated as this one was, to fifteen miles per hour, and it is manifest from the record that the injury was caused by the recklessness of the deceased in undertaking to round a curve, or turn at intersection of streets at a high and dangerous rate of speed. The pole was situated outside of the travelled way, and it was not negligence to permit the pole to be erected as it was in this case. We think the record fails to show liability against the appellants, and the judgment of the court below will be reversed and judgment entered here for the appellants."
>
> *G. & M. Coast Traction Co.* v. *Manuel*, 85 So. 308, 123 Miss. 266.

We may go on indefinitely in pointing out Mississippi cases to support the conclusions reached by the circuit court of appeals in the case at bar. But we shall satisfy ourselves with what has already been said in support of the particular point under discussion. As heretofore indicated, we have intended to cover under this phase of our argument that appearing under Point "A" of brief of petitioner, beginning with page 25 of the printed brief and ending with page 36 thereof.

2.

The Circuit Court of Appeals Did Not Invade the Province of the Jury in Holding That Petitioner's Conduct in Failing to Have His Car under Proper Control As He Approached and Entered the Curve Was the Sole Proximate Cause of the Accident.

We are here dealing with what is identified as Point "B" under petitioner's argument beginning with page 37 and ending with page 42 of his brief. In the opinion, the circuit court of appeals stated that "the contractor opened the road at the request of the highway commissioner's field engineer, and although the road had not been finally accepted by the state, so far as the contractor's work was concerned the road was safe. The curve where the highway entered Hawkins Avenue did not constitute a pitfall or deathtrap for motorists. The curve was not in itself dangerous, and could be and was safely negotiated by drivers of other automobiles travelling along the road that very night. The curve only became dangerous to appellee because of the reckless manner in which he approached it. Although it was at night and he was approaching and was in the corporate limits of Columbia, he maintained his rapid speed and made no attempt to slow down until it was too late to make the curve. It is clear from the record that Hayes was the author of his own misfortune, and the construction company was in no way guilty of negligence which caused or contributed to the

accident" (R. 463). The circuit court of appeals further stated that "the conclusion is inescapable that the failure of the appellee to have his car under proper control as he approached and entered the curve was the sole proximate cause of the accident. The defendant's motion for an instructed verdict should have been granted." The testimony furnished for the parties on both sides in the trial requires the conclusion of facts and law to be reached as announced by said circuit court of appeals. If there had been evidence that others could not negotiate the slight curve, this question may have arisen. If there had been any testimony to show that the place was a pitfall or a deathtrap, a different conclusion might have been reached. But there appears to have been no other accident at the particular place besides the one in which petitioner participated. He was driving down a perfect road, with a perfect car, at a rapid rate of speed, and he maintained his rapid rate of speed until it was too late to slow down to make a curve he was required to make in going into Hawkins Avenue in Columbia, Mississippi, at the south end of the new highway. It is undisputed in the record that the accident happened within the corporate limits of the city of Columbia. It was contended by attorneys for petitioner in presentation of this cause to the circuit court of appeals, that Ordinance No. 167 of the city of Columbia had no application (R. 367-370). Attorneys for petitioner insisted that the general speed laws of Mississippi as fixed by Section 51, Article 6, Chapter 200, of the General Laws of the State of Mississippi for 1938, were applicable, and said Sections 51 and 52 of the same laws are correctly quoted on page 39 of petitioner's brief. It will be noted that said Subsection 2 of said Section 51 provides that the maximum speed in a municipality in the residential district is twenty-five miles per hour. Petitioner is now contending that he was not in a residential district when the accident occurred, although those testifying with knowledge of the surrounding territory identified the existence of houses

at and adjoining the particular intersection. Mrs. M. M. Neal identifed her home as being at the northwest intersection of Hawkins Avenue with new Highway No. 13. She even identified the photographs of the scene and the surrounding houses, which are a part of the record in this cause (R. 97-104). Edgar Fortenberry, policeman, with Sharp Branton and W. R. Owen, also identified the intersection where the accident occurred in the midst of houses on each side of Hawkins Avenue and adjacent to the south end of the new road (R. 234-242 and 242-246). Robert Newsome identified his own home as being almost adjacent to the particular intersection and just to the west of the home of Mrs. M. M. Neal (R. 246-256). John Still (R. 291), Mrs. John Still (R. 304), Miss Merl Bustin (R. 309), Mrs. W. B. East (R. 314) and Mrs. J. C. East (R. 326) all testified that they were in and about the home of Mrs. W. B. East at the intersection where the accident occurred and on the south side of Hawkins Avenue. Caston Robbins (R. 335) and Jimmie Yancey (R. 340) were witnesses to the accident, and were in homes near, or adjacent to the intersection where the accident occurred. In other words, most of the witnesses to testify were located at the time of the accident in the vicinity of the intersection, and it is their testimony which shows without dispute that the place where the accident occurred is in a residential district. The twenty-five mile speed limit, therefore becomes applicable.

We are unwilling to admit that the city ordinance providing for a speed of less than 25 miles per hour was not valid and binding on petitioner at the time of the accident, but there is no good that can come from an argument affecting same since it is the undisputed testimony of all of the witnesses for both petitioner and respondent on the trial of the cause that no danger could come to anyone negotiating the particular curve in question when driving at from 25 to 30 miles an hour. G. W. Williamson made the curve at 25 to 35 miles per hour, without knowing of its existence (R. 73-82). On the

night of the accident Mrs. Shelby Coulter made the curve at about thirty miles per hour (R. 87-91). W. D. Corley and his wife were driving at 45 miles per hour until they approached the curve, and they slowed down to 25 miles per hour to make the curve (R. 126 and 133). Sebe Dale approached the curve at 50 miles per hour, and slowed down and made the curve without difficulty (R. 148-154). The father, mother and sister of the petitioner made the curve on the night of the accident at from 25 to 30 miles an hour, without difficulty (R. 158-161). All these witnesses were produced for petitioner, and they were all of one accord in placing the speed of 25 miles an hour or above as a speed at which the curve could be made with safety. In other words, if petitioner had been driving his automobile at a lawful rate of speed at the time of the accident, it would not have occurred. If he had been driving his automobile and keeping a proper lookout, as others who made the curve on the night of the accident, he would have had no trouble because he would have known that he had to make a slight right turn to get into Hawkins Avenue as he drove south on the new highway. In other words, petitioner had a duty to keep a vigilant lookout for himself and those in his automobile. This, he failed to do. It so happens that there were no questions of fact for determination by the jury. "Where there is no controversy as to the facts, the question of negligence is for the court; otherwise, it is for the jury." *Thomas* v. *Electric Company*, 46 S. E. 217, 54 W. Va. 395. It is true that the Supreme Court of Mississippi has held that violations of traffic laws by a plaintiff will not of itself bar a recovery, but it is further true that the burden is on the plaintiff to show that the defendant was guilty of negligence which caused or contributed to the accident, injury and loss. In the case at bar, there was no negligence of respondent which in any way caused or contributed to the accident in question. The Supreme Court most recently, in the case of *Supreme Instruments Corporation* v. *Lehr*, 1 So. (2d Ser.), pages

242-245, has pointed out that a court has some obligations respecting issues of fact and when same should be submitted to a jury. It is apparent to anyone reading the record here involved, that the accident would not have occurred had petitioner kept the proper lookout and kept his automobile under control. If the facts of this case had been before the Supreme Court of Mississippi, the same result would have been reached as disclosed in opinion of the circuit court of appeals. In the Lehr case here mentioned, the court said of this question:

> "The area of factual doubt within which juries should be allowed to function is circumscribed within a circle of which care is the axis and reasonableness the radius. Within this area, reasonableness is to be adjudged by reasonable men, and their right to differ is commensurate with our duty to consult. Here yond this limit lies the field of substantive law. Here are found those issues as to which reasonable men should not be in disagreement. It is here that 'the court is not called upon to decide the issues of fact one way or the other, but it is called upon to decide whether there is an issue of fact under the law to go to the jury.' *City of Hazlehurst* v. *Mathews*, 180 Miss. 42, 176 So. 384, 385. As was said by Cardozo, J., in *People* v. *Galbo*, 218 N. Y. 283, 112 N. E. 1041, 1045, 2 A. L. R. 1220, 'insufficient evidence is * * * no evidence.' Absence of a handrail under the circumstances cannot be held to be negligence, much less a contributing proximate cause of the injury. Any defect, therefore, was not in the step but in the stepping. No negligence may be predicated upon the construction or maintenance of the step in question."

It is indicated that petitioner is claiming and contending that when an appellate court concludes that the testimony is insufficient to justify recovery, the holding of the appellate court invades the province of the jury. Practically every case, if not every case we have cited as authority for respondent here has been a case where the appellate court has reversed the trial court and caused judgment to be entered on appeal. The Supreme Court of

Mississippi in a case decided in June of this year, has reversed a trial court and caused judgment to be entered for the defendant on appeal where it was recognized that the defendant was guilty of negligence, but where the appellate court concluded that there was no causal connection between the negligence of the defendant and the accident and injury complained of. It was a case where a railroad train crew did not comply with the bell and whistle statute existing in Mississippi, but the court held that the cause of the accident and injury was the speed of the automobile driven by the plaintiff and the failure of the plaintiff to look and listen and take the necessary precautions for his own protection.

> "It is not enough in any case merely that the defendant was negligent. The failure to ring the bell or blow the whistle does not of itself impose liability. If it did, then a man stone deaf, with nobody in sight of him, could recover. The statute does not so attempt, even if it could constitutionally do so—however much upon a casual approach there may be a feeling to the contrary. In this, as in all cases, it is necessary to a cause of action on account of the negligence that the latter shall have been the proximate, or a contributing, cause of the injury to another; and in order that it shall be a proximate or contributing cause, it must have been a substantial factor in producing injury. And an actor's negligent conduct is not a substantial factor in bringing about harm to another if it would have been sustained even if the actor had not been guilty of the particular negligence charged. 2 Rest. Torts, Par. 432. The foregoing statement is particularly applicable in those cases where the actor's negligence consists in the failure to take certain precautions which are required by law for the protection of another's person or chattels, of which the requirement to ring the bell or blow the whistle at public crossings is an example. In such a case, if the same harm both in character and extent, would have been sustained even had the actor taken the required precautions, his failure to do so is not even a perceptible factor in bring-

ing it about, and cannot be a substantial factor in producing it. 2 Rest. Torts, Par. 1162."

New Orleans & Northeastern Railroad Company v. *Burge*, (Miss.) 2 So. 2d, p. 825.

In the same case, the Supreme Court of Mississippi identified the case of *Teche Lines, Inc.*, v. *Bounds*, 182 Miss. 638, 649, 179 So. 747, with approval, and stated that "to say on the record in the present case that had the required signals been given the injury would not have occurred, is to invoke a possibility or conjecture, and it is not within the legitimate province or power of a jury to convert a possibility into something more by the mere force of a verdict." In the same case, the Mississippi court announced the rule existing in Mississippi that "to thus convert what, on the facts, is no more than a possibility into something more, would be to allow an arbitrary exercise of power by an agency employed in government, and in that connection due process must be remembered as a primary constitutional mandate." The court in the Burge case held that the injured party could not recover, and the trial court was reversed and a judgment was entered by the Supreme Court for the appellant. The case of *G. & M. Coast Traction Company* v. *Manuel*, 85 So. 308, 123 Miss. 266, demonstrates the attitude of the Supreme Court of Mississippi that no duty is imposed by law on a municipality or others to have a warning that a street does not continue on but that it ends and the traveler must turn to the right or to the left. In said case the trial court was reversed and a judgment was entered for the appellant. In the *Lamensdorf, Case, supra*, the trial court was reversed and judgment was entered for the appellant. Other Mississippi cases on the same subject have stated the rule thus:

"The driver of a motor vehicle must keep his machine under control and be on the alert for pedestrians and other motor vehicles on the highway. He must drive at a rate of speed which will enable him

to avoid injury to those who would come under his observation."

Rhodes v. *Fullilove,* 134 So. 840, 161 Miss. 41.

"The driver of a motor vehicle has not the right to a clear road, but must anticipate the presence of persons and vehicles thereon, and must at all times drive at such a rate of speed as will enable him to avoid injury to such persons and vehicles when they come, or should come under his observation. *Ulmer* v. *Pistole,* 115 Miss. 485, 76 So. 522."

Frazier v. *Hull,* 127 So. 775, 157 Miss. 303.

See, also: *Western Union* v. *Stephenson,* 36 F. 2d 47.

In this particular case, if there had been a warning sign at the end of the road it would have done no good. The intersection was open and obvious, and by the use of ordinary care on behalf of the driver of the motor vehicle it would have been seen in time to negotiate the small curve required to be made in going into Hawkins Avenue in a westerly direction. There is nothing in the record in this case to justify a conclusion that the plaintiff did not see the end of the road, and did not recognize that he was approaching the Hawkins Avenue intersection for a sufficient time to bring the automobile to a stop, or to reduce the speed thereof so as to negotiate with ease the curve that was before him. The thing that has bothered us through the trial and since is that there was no testimony whatsoever to show that the driver of the automobile, being appellee, was keeping any lookout whatever, or that he did not see the intersection in time to protect himself and the other two occupants of the automobile.

"There is perhaps no principle more universally recognized in the law than this; that when either the common law or a statute, or a contract requires the giving of notice or warning, it is immaterial that the notice or warning was not given, and no actionable wrong is predicable upon the failure to give such

notice or warning, when the party has otherwise, within sufficient time, obtained the knowledge which the notice or warning would have furnished, leaving aside those cases where the notice must be served in writing."

Thompson v. *Mississippi Central Railroad Co.*, 175 Miss. 547, 166 So. 353.

In the same case, our court said of the proximate cause of the accident that:

"These holdings are within the primary principles first above stated, for when appellant's decedent, the driver of the automobile, saw the train, and this in time to have avoided going upon the track, the connection between the failure to give the signals and the injury was broken, cut off, fenced out, insulated, and thereupon the sole proximate cause became the negligence of the automobile driver in the attempt to beat the train across the crossing.

"It is urged with great ability and ingenuity that, if these signals had been given, the mother would have gone in search of her child earlier—in ample time to have rescued her child and have removed herself from danger. In the argument of this proposition, the able and astute counsel for appellant placed themselves upon the springboard of imagination, and leaped into the realm of conjecture. Their argument upon this proposition is conjecture, pure and simple; and in such an instance 'experience becomes an infant and speculation a contingency.' Judgments of courts, and verdicts of juries should not rest upon so airy a foundation."

Billingsley v. *Illinois Central Railroad Co.*, 100 Miss. 612, 56 So. 790.

As hereinbefore stated, petitioner correctly quotes from the Mississippi law affecting maximum speed for motor vehicles at page 39 of his brief to support petition for writ of certiorari. It is there set forth that the maximum speed for automobiles in a residential district is 25 miles per hour. We have heretofore pointed out that petitioner was driving more than 25 miles per hour, ac-

cording to his own pleadings and proof. Under the undisputed testimony, petitioner was driving his automobile at the time of the accident, at a speed of at least 40 to 45 miles per hour, and he made no effort to reduce the speed of his automobile until he was on Hawkins Avenue and after he had gotten off of the south end of the highway. The testimony of the two occupants of the automobile with petitioner is that the brakes were not applied to the automobile by the driver until the automobile had gone approximately one-half way over Hawkins Avenue. The testimony, as heretofore pointed out, is undisputed that a number of people, witnesses for petitioner, came over the highway on the night of the accident and made the turn at from 25 to 30 miles an hour, and at even greater speeds than that. Petitioner could have made a right turn into Hawkins Avenue at 25 miles per hour, or even at a greater rate of speed, with perfect safety had he been driving at the lawful rate of speed. As above indicated, this conclusion is reached from the undisputed testimony in the record.

> "The appellant admits that he was driving downgrade at a speed of about 40 miles per hour, with lights which rendered objects visible for a distance of not more than 100 feet ahead of his automobile, and that, although he was keeping a sharp lookout ahead, he did not in fact see the parked car on the side of the highway until he was within thirty or forty feet of it, at which time it was too late to possibly avoid striking it. The evidence fails to show that the appellee was guilty of any negligence which caused or contributed to the injury, and, under all the facts in this record, we think the appellee was entitled to the peremptory instruction requested by him."
>
> *Whitley* v. *Holmes*, 164 Miss. 423, 144 So. 48.

We desire to mention that all of the occupants of petitioner's automobile testified that said automobile was in perfect condition at the time of the accident and that its lights and brakes were properly functioning. In this case,

your respondent had a right to assume that the conduct of motorists on the highway would reach the standards required by law. In other words, respondent had a right to assume that ordinary care would be used by every individual on the highway even after it was accepted by the highway department and opened to traffic.

> "Precaution is a duty only so far as there is no reason for apprehension. Ordinary care of a reasonably prudent man does not demand that a person should prevision or anticipate an unusual, improbable, or extraordinary occurrence, though such happening is within the range of possibilities. Care or foresight as to the probable effect of an act is not to be weighed on jewelers' scales, nor calculated by the expert mind of the philosopher, from cause to effect, in all situations. Probability arises in the law of negligence when viewed from the standpoint of the judgment of a reasonably prudent man, as a reasonable thing to be expected. Remote possibilities do not constitute negligence from the judicial standpoint."
>
> *Illinois Central R. Co. v. Bloodworth,* 145 So. 333, 166 Miss. 602.

The rules of law announced in the several cases above cited and quoted from are universal and are supported by numerous other decisions of the Supreme Court of the State of Mississippi. We have purposely picked out for citation cases in most instances where the Supreme Court of Mississippi has reversed the trial court and caused judgment to be entered on appeal. This had been done by us to show that in Mississippi it is commonplace for trial courts to be reversed and judgments to be entered in the appellate court. The court has a function to perform. It is not supposed to pass upon questions of fact where same have been submitted to a jury, but if the facts are not such as to make a case of liability against a defendant, it becomes a duty of the trial court to take the case from the jury, and if the trial court fails in this duty, it then becomes the duty of the appellate court to

correct the trial court and cause an appropriate announcement of the law to be made and judgments to be entered in accordance therewith. This conduct on behalf of appellate courts cannot be properly construed as an inroad upon the rights of any individual to a trial by jury as guaranteed by the Constitution of the United States and of the several states of the American Union. As we view it, the point is not well taken, and the cause is not subject to review by this court.

3.

The Circuit Court of Appeals Committed No Error in Reversing the Trial Court.

In our technical challenge of the petition filed in this court, we tried to express surprise at the contention of petitioner that the Circuit Court of Appeals for the Fifth Circuit violated Rule 50 (b) of Civil Procedure for Federal District Courts. In the first place, we contend that there was a compliance by respondent with Rule 50 (b) in making combined motion for a new trial or corrected judgment; but if we are mistaken in this, the circuit court of appeals did not reverse the cause and have judgment entered in the appellate court for respondent. It is true that the opinion analyzes the record and concludes therefrom that the sole proximate cause of the accident was the failure of petitioner to have his car under control as he approached and entered the curve where the accident occurred. Under the existing record, we contend that respondent could have filed a motion for rehearing in the appellate court and obtained a judgment at the hands of that court. This, we did not do. The appellate court only reversed the trial court, and the order entered thereon, as shown on page 463 of the record, is nothing more nor less than a reversal of the trial court. At the conclusion of the testimony offered for petitioner, a motion was dictated into the record, in the absence of the jury, for a directed verdict. The grounds for the mo-

tion were that the testimony was insufficient to show negligence on behalf of the C. C. Moore Construction Company and that the plaintiff had not offered testimony to entitle him to recover. This motion was overruled by the court, and the trial continued (R. 200-201). At the conclusion of all of the testimony, another motion was dictated for the C. C. Moore Construction Company seeking to exclude and for a directed verdict, and the grounds therefor were that there was no testimony to show that the plaintiff kept a proper lookout, and there was no testimony to show that the defendant was guilty of negligence, and the testimony and the physical facts required the conclusion that the sole proximate cause of the accident and injury was the speed of the automobile of the plaintiff. Said motion was overruled (R. 412-413). A written motion for a directed verdict was filed, where the grounds were near identical with those set forth in motion to exclude and for directed verdict at the conclusion of the taking of testimony. The written motion was overruled and a written order was taken thereon (R. 442-444). The jury retired and returned a verdict for petitioner in the sum of $15,750. A motion for a new trial or corrected judgment was filed on the following day. In said motion there were set forth reasons why the judgment should be corrected, or why a new trial should be granted. The court in the order properly identified the motion and held that it was not well taken and should be overruled (R. 445-448). With this preliminary statement, we shall answer the three propositions of our opposition affecting Rule 50 (b) together.

It is first pointed out on page 43 of petitioner's brief that the decisions of this court which led to the adoption of Rule 50 (b) show that motions for judgments notwithstanding verdicts are necessary to the granting of such judgments upon appeal. The cases of *Baltimore & C. Line* v. *Redman,* 295 U. S. 654, 79 L. Ed. 1636, and the dissenting opinion of Justice Hughes in *Slocum* v. *New York Life Ins. Co.,* 228 U. S. 364, 400, 57 L. Ed. 879, are cited in

support thereof. These decisions, of course, were not based upon the new rule. However, as we have pointed out heretofore, the circuit court of appeals did not cause judgment to be entered but only reversed the trial court. And, as we have pointed out in our brief heretofore, the circuit court of appeals could have caused judgment to be entered for appellant, respondent here, based upon the existing record. We contend that attorneys for respondent had substantially complied with new Rule 50 (b), and that the court could have acted thereon and caused judgment final to have been entered in favor of respondent. The second proposition raised by petitioner affecting Rule 50 (b), is that same contemplates motions for judgment notwithstanding verdict, and the third basic statement affecting said Rule 50 (b) made for petitioner is that this court has definitely decided that motions for judgments notwithstanding verdicts are necessary before an appellate court can reverse and enter final judgment on appeal. Before we furnish some authorities, we must again state to the court that the circuit court of appeals in the opinion complained of, and which appears at pages 459 to 463 of the record, did not reverse the trial court and enter final judgment on appeal, but instead only reversed the trial court. However, if we should assume for the sake of argument that the circuit court of appeals did reverse the trial court and cause judgment to be entered in the appellate court, this court would still look with favor upon such action and because the record is sufficient to justify such action had it been taken by the circuit court of appeals.

There is no hard and fast rule, we assume, respecting the verbiage of the motion contemplated by said Rule 50 (b). All that is necessary is to call to the attention of the court its error in refusing to sustain motion for directed verdict, and to point out in a composite motion for new trial or rehearing that the movant is entitled to this relief. That is exactly what attorneys for respondent were trying to do when the motion was filed. That is exactly

what the trial court knew we were doing. Petitioner and his attorneys likewise knew that we were trying to get a corrected judgment if possible, and if not and in lieu thereof we were trying to get a new trial. The order on the motion correctly identifies its contents and purpose, and respondent cannot be charged with a technicality resulting from a typographical error.

If it is to be assumed for the sake of argument that the circuit court of appeals did cause a reversal of the trial court and a judgment, and if we are to further assume that the motion for a corrected judgment filed for respondent before the trial court was insufficient, there is still authority to support the view that the appellate court would have a right to cause judgment to be entered. However, it is not true that the circuit court of appeals in this case caused judgment to be entered for respondent. There was nothing more in the judgment than that of a simple reversal. In an interesting case involving the federal rule in question, Judge Soper of the Fourth Circuit Court of Appeals, reversed and remanded the trial court, and, in the opinion, said:

> "Judgment will be reversed, and as the defendant in due course of the trial moved the district judge for a directed verdict in its favor, and after the verdict moved the court to set it aside and enter judgment in its favor, the case will be remanded to the district court in order that a judgment for the defendant may be entered in accordance with Rule 50 of the Rules of Civil Procedure."
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> *Southern Railway Company* v. *Bell*, 114 F. 2d 341.

We identify the above opinion because it has some indirect application to the contentions of petitioner. None of the cases mentioned involve a case where there was no judgment entered by the appellate court, although there was some effort to comply with Rule 50 (b). If anyone had a right to review the appellate court here, it would be respondent, and for the reason that the opinion is suf-

ficient to justify judgment, but no judgment was rendered in favor of respondent. It is possible that the circuit court of appeals concluded that the application for corrected judgment was not sufficient to comply with Rule 50 (b). If the court should decide to sustain the petition for writ of certiorari on the ground here under discussion, it would be passing upon a question of law not raised or brought into play in or before the circuit court of appeals. Petitioner did not complain to the court of appeals that there had been a violation of Rule 50 (b). Any such contention would have been met with the existing record which would answer the complaint and for the reason that the court of appeals only reversed the trial court. It is assumed that there are a great many applications for writs of certiorari based upon the interpretation or misinterpretation of the new rules of procedure affecting federal district courts. There are likely some cases where the petition or application is well taken, but we believe that a casual analysis of the record and opinion of the circuit court of appeals will convince this court that there has been no violation in any kind of way of any part of said Rule 50 (b). It is proper here again to identify remarks of Honorable William D. Mitchell, Chairman of the United States Supreme Court's advisory committee on the Federal Rules of Civil Procedure in proceedings of the American Bar Association Institute at Cleveland in 1938, and which appears at page 315 of said proceedings and was quoted with approval in the case of *United States* v. *Halliday*, 116 F. 2d, p. 812, decided by the Circuit Court of Appeals for the Fourth Circuit on January 9, 1941. Said quotation appears in another section of this brief at pages 6-7. In the Halliday case, there was a motion for a directed verdict, but there was no motion after the verdict except for a new trial, which was overruled. However, in that case on appeal the circuit court of appeals speaking through Judge Dobie reversed the trial court and remanded the cause to that court with directions to enter judgment in favor of the United States.

In the case of *Montgomery Ward & Company* v. *Duncan,* identified at page 46 of petitioner's brief and reported in 85 L. Ed., p. 123, 311 U. S., p. 243, this court held that where a trial court had an alternative motion for a new trial and corrected judgment, and acted only on motion for a judgment, and the circuit court of appeals had reversed and remanded the trial court with instructions, the order of the circuit court of appeals should be altered to cause the case to be remanded for action by the district court on motion for a new trial. In the case at bar, there was only a reversal, and not a reversal with instructions except so far as the opinion would by indirection become binding on the trial court as to principles announced. In the case of *Conway* v. *O'Brien,* 85 L. Ed. 574, not officially reported, Rule 50 (b) was not applied because this court passed on the case on its merits. In the case of *Berry* v. *United States,* also mentioned in petitioner's brief, no motion for judgment was made in the ten-day period as provided by said Rule 50 (b), and the court held that the circuit court of appeals had no right to dismiss the cause and cause judgment to be entered on appeal, but same should have gone back to the trial court, as contemplated by judgment of the circuit court of appeals entered in this cause.

Before we present our concluding remarks, we desire to state that since the circuit court of appeals passed only upon the features of the litigation involving the rights of respondent to a judgment as a matter of law, and did not consider the various other questions raised before the trial court, which would likely have caused the trial court to be reversed and the cause remanded had the other questions been considered, it is assumed that the sole question to be considered on this petition will have to do with the sufficiency of the petition; or if the court concludes that the petition is all-sufficient, then it is assumed that the sole question to be considered by this court will deal with the peremptory feature of the litigation. We shall, therefore,

not use time and space to present the other questions of law dealing with reversible errors of the trial court.

CONCLUSION.

It is respectfully submitted that the circuit court of appeals committed no error in the opinion written; that the circuit court of appeals did not direct the trial court to enter judgment for respondent, and that there is nothing for review and determination by this Honorable Court in order that justice may be done. None of the questions raised in the petition were pointed out to the circuit court of appeals through motion for rehearing or otherwise, and it was given no opportunity to make amends if there be error; and this is not that class of cases where there are special and important reasons for a review on writ of certiorari. The circuit court of appeals, as hereinbefore pointed out, has not decided "an important question of local law in a way probably in conflict with applicable local decisions." The circuit court of appeals has not decided "an important question of federal law which has not been, but should be settled by this court." We respectfully submit that the petition for writ of certiorari is not well taken and should be denied.

Respectfully submitted,

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"We have this day delivered to Honorable Lee D. Hall, one of the Attorneys of record for Petitioner, a true copy of the foregoing response.

"This, August 5, 1941."

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